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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

vs.

LEHIGH VALLEY RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(37,056)

(37,056)

SUPREME COURT OF THE UNITED STATES

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STATE OF NEW YORK

COURT OF APPEALS

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff-Respondent,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant-Appellant.

STATEMENT UNDER RULE 234

This action was commenced by the service of a Summons and Complaint on the 11th day of January, 1929. The answer was duly served and issue joined thereby on the 29th day of January, 1929.

The case was brought on for trial before the Hon. Joseph D. Senn, Justice of the Supreme Court at a trial term of the Supreme Court held in the County of Tompkins commencing on the 18th day of March, 1929.

The action was brought under the Federal Employers Liability Act and the jury found a verdict for the sum of $12,096 which was reduced by 40% by reason of contributory negligence of the defendant.

Judgment was entered upon the verdict of the jury in the office of the Tompkins County Clerk on the 19th day of February, 1930, in favor of the plaintiff and against the defendant in the sum of $7,257.60 damages and $487.51 costs. An order denying the defendant's motion for a new trial was entered in the office of the Tompkins County Clerk on the 4th day of February, 1930.

4 Upon appeal to the Appellate Division, the judgment and order appealed from were affirmed by a divided Court. The order of affirmance was entered in the Appellate Division, Third Department, on the 26th day of November, 1930, and in the office of the Clerk of the County of Tompkins on the 24th day of January, 1931. The judgment of affirmance was entered in the office of the Clerk of the County of Tompkins on the 28th day of January, 1931. The appeal to the Court of Appeals was perfected by the due service of the notice of Appeal on the Tompkins County Clerk and on the attorney for the plaintiff-respondent on the 19th day of March, 1931, and by the filing in the office of the Clerk of the County of Tompkins the undertaking prescribed by Section 593 of the Civil Practice Act and by serving a copy thereof on the attorney for the plaintiff-respondent on March 19, 1931.

5 There has been no change of parties or attorneys since the commencement of the action.

SUMMONS

STATE OF NEW YORK

SUPREME COURT—COUNTY OF TOMPKINS

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff,

vs.

6 LEHIGH VALLEY RAILROAD CO.,

Defendant.

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this

summons, to serve a notice of appearance, on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Tompkins.

Dated this 9th day of January, 1929.

DANIEL CROWLEY,
Plaintiff's Attorney,
Office and Post Office Address,
City Hall, Ithaca, New York.

COMPLAINT.

SUPREME COURT—TOMPKINS COUNTY

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,
Plaintiff,

vs.

LEHIGH VALLEY RAILROAD CO.,
Defendant.

The plaintiff above named by Daniel Crowley, her attorney, complains of the defendant, and alleges:

1. That on or about December 8, 1927, Joseph Rocco, then a resident and citizen of the city of Ithaca, county of Tompkins, and State of New York, died leaving a last will and testament which named the plaintiff, Mary Rocco, the executrix thereof;

that said last will and testament of Joseph Rocco aforesaid was duly admitted to probate by and in
10 the Surrogate's Court of the County of Tompkins, and letters testamentary were duly issued to Mary Rocco, plaintiff herein, who duly qualified as executrix thereunder, and since been, and now is acting as executrix of the last will and testament of Joseph Rocco aforesaid deceased.

2. Upon information and belief, that at all times herein mentioned the defendant was and still is a foreign railroad corporation duly organized and existing pursuant to the laws of the State of Pennsylvania.

3. That at all times herein mentioned the de-
11 fendant was operating a railroad which ran into and through the States of Pennsylvania and New York, with a line or railroad running from Sayre, Pennsylvania, to Ithaca, New York, and with a branch line of railroad from Ithaca, New York, to Auburn, New York, and that said railroad during said times was doing an interstate business and carrying freight and passengers in interstate traffic for hire.

4. That at all times hereinmentioned the plaintiff's testator and the defendant were engaged in interstate commerce.

5. That on the 8th day of December, 1927, plain-
12 tiff's testator, Joseph Rocco, was employed by the defendant to inspect that portion of the defendant's tracks between Ithaca, New York, and the Rock Salt Mines, located on the Ithaca-Auburn branch road of the defendant, and for this purpose defendant furnished to the said Joseph Rocco a handspeeder with which to cover said territory; that on

said 8th day of December, 1927, while this plaintiff's testator, Joseph Rocco, was in the employ of the defendant as aforesaid, and was performing his duties on said Ithaca-Auburn line and at a point on said line near the entrance to Stewart Park, Ithaca, New York, the defendant, through its officers, agents and employees negligently and carelessly caused said injuries to said plaintiff's testator as a result of which said plaintiff's testator was instantly killed. 13

6. That the said branch line of the defendant running from Auburn to Ithaca, New York, was at the time of the accident aforementioned used for the transportation of interstate freight and passengers; that while the said Joseph Rocco was proceeding along the tracks on said branch line and was near the Stewart Park entrance a train of the defendant, operated by the defendant's employees, and which was at said time and place carrying interstate passengers and freight ran into and against the speeder upon which said Joseph Rocco then was, and demolished the same and caused injury to the said Joseph Rocco from which he died; that at the time of the injury to said Joseph Rocco as aforesaid, said Joseph Rocco was engaged as employee of the defendant in the inspection of the tracks and road bed of said branch line of the defendant, which tracks and road bed was at said time and place being used for the transportation of interstate freight and passengers. 14 15

7. That the injury to and the death of said Joseph Rocco aforementioned were caused by the negligence of the defendants, its officers, agents and

employees in that the train of the defendant which
16 came into contact with the said speeder upon which the plaintiff's testator then was, was being operated by the defendant's employees in a negligent and careless manner at a reckless rate of speed, without warning to the plaintiff's testator by whistle or bell as to the approach of said train, and without warning of said train for a crossing at or near which said plaintiff's testator then was, which failure of warning was in violation of the railroad law of the State of New York; that the defendant was further negligent in that its employees who were in charge of and operating said train did not have said train under control so that the same would be or was
17 stopped before striking the speeder upon which the plaintiff's testator then was; that the defendant was further negligent in that it failed to promulgate and enforce rules for the protection of this plaintiff's testator in his duties as trackwalker and track inspector, more particularly a rule for the notification to plaintiff's testator of the location of trains and time of arrival and schedule of operation of trains on said tracks; that said train was being operated in a negligent manner for the reason that it was being driven at said time and place at an excessive rate of speed in a location thickly populated
18 and where its tracks were crossed at the grade by highways at which place it was the custom and rule of the defendant to operate its said train at a moderate and cautious rate of speed; that the defendant was further negligent in that said train was about three hours late, and the employees operating said

train knew or should have known that this plaintiff's testator was performing his duties along said track, and that for this reason the operators of said train should have given warning of said train's approach at the scene of the accident, which was on a curve and where sheds, telephone poles and signals poles and other structures shut off the view, and that the defendant's employees should have operated said train at a cautious rate of speed for the protection of this plaintiff's testator; that the defendant was further negligent in that its employees did not give warning to plaintiff's testator; that the defendant was negligent in not giving notice that the train, which hit the speeder, was operating on said track and not on schedule time; that the defendant was further negligent in that it failed to furnish the plaintiff's testator with a safe place to work; that the defendant was further negligent that it failed to promulgate and enforce a rule which gave notice to those operating its trains as to the locataion and position of this plaintiff's testator as a trackwalker so that the operators of said train could be on the lookout for plaintiff's testator at or near the place where he was working.

8. That said Joseph Rocco left him surviving Mary Rocco, his widow, the plaintiff herein, and Gabriel Rocco, Anthony Rocco, Lena Rocco Ceaschi and Mary Tubbs, his children and only next of kin and heirs at law.

9. That as a result of the negligence of the defendant as hereinbefore set out, and by reason of the death of said Joseph Rocco the plaintiff and the next

of kin of said Joseph Rocco were damaged in the
22 sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, plaintiff demands judgment in the sum of Fifty Thousand Dollars ($50,000.00) together with the costs and disbursements of this action.

DANIEL CROWLEY,
Plaintiff's Attorney,
Office & P. O. Address,
City Hall, Ithaca, New York.

STATE OF NEW YORK,
County of Tompkins, } ss.
City of Ithaca,

23

Mary Rocco, being duly sworn, deposes and says that she is the plaintiff in this action; that she has heard read the foregoing Complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Her
MARY (X) ROCCO.
Mark

Sworn to before me, this 9th
day of January, 1929.
24 CHARLES P. COFFEY,
Notary Public.

ANSWER.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF TOMPKINS

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant.

The defendant, answering the plaintiff's complaint by Cobb & Cobb, its attorneys:

First. Denies any knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of plaintiff's complaint designated as "1", "4" and "8".

Second. Denies each and every allegation contained in the paragraphs of plaintiff's complaint designated as "5", "6", "7", and "9".

Third. For a separate and complete defense defendant alleges that the death of the said decedent was caused solely through his negligence and that no negligence of the defendant caused or contributed to said accident.

Fourth. For a separate and complete defense defendant alleges that the decedent at the time of the accident mentioned in the complaint was engaged as a railroad employee and said accident occurred in the course of and out of the said employment and out of

the ordinary risks relating thereto, which risks the
28 said decedent assumed.

Wherefore, defendant demands judgment dismissing the plaintiff's complaint with costs.

COBB & COBB,
Attorneys for Defendant,
Office and Postoffice Address,
Savings Bank Building,
Ithaca, New York.

STATE OF NEW YORK,)
County of Tompkins,) ss.

Howard Cobb, being duly sworn, says that he is
29 one of the attorneys for the defendant within named; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification is not made by defendant is because defendant is a foreign corporation and has no officer within the County of Tompkins, where defendant's attorneys reside, capable of making the same.

Deponent further says that the sources of his information and the grounds of his belief as to all mat-
30 ters not therein stated upon his own knowledge are: Statements and reports of investigations made by the defendant's claim adjuster and furnished to deponent.

HOWARD COBB.

Sworn to before me this 23d day of January, 1929. 31

HAROLD E. SIMPSON,
Notary Public.

PLAINTIFF'S JUDGMENT.

STATE OF NEW YORK

SUPREME COURT—COUNTY OF TOMPKINS

MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased.
Plaintiff, 32

vs.

LEHIGH VALLEY RAILROAD CO.,
Defendant.

The issues in the above entitled action having been duly brought on for trial before Hon. Joseph D. Senn, one of the Justices of this court, and a jury, at an appointed trial and special term of this court, held in and for the County of Tompkins, at the County Court House, in the City of Ithaca, on the 20th, 21st and 22d days of March, 1929, and the plaintiff having duly appeared by Daniel Crowley, Esq., 33
her attorney, with Riley H. Heath, Esq., of counsel, and the defendant having duly appeared by Howard Cobb., Esq., and Harold E. Simpson, Esq., of counsel, and the issues having been duly tried, and the jury having on the 22nd day of March, 1929, duly ren-

dered its verdict in favor of the plaintiff for the sum
34 of $7,257.60 and the costs of the said plaintiff having been duly taxed at $87.00 and the interest on said verdict from the 22nd day of March, 1929, having been duly computed by the Clerk at the sum of $389.51, and with the sums so taxed as costs amounting to $487.51;

Now, on motion of Daniel Crowley, attorney for the plaintiff, it is

Adjudged that the plaintiff, Mary Rocco, as executrix, etc., of Joseph Rocco, deceased, recover of the defendant, the Lehigh Valley Railroad Company, the
35 sum of $7,257.60 found by the jury as aforesaid, together with $487.51 costs and interest on the verdict as taxed, amounting in all to $7,745.11, and that the plaintiff have execution therefor.

Dated this 19th day of February, 1930.

L. L. EARL,
Deputy Clerk.

36

ORDER DENYING MOTION FOR A NEW TRIAL.

At a trial and special term of the Supreme Court, State of New York, held in and for the County of Tompkins, at the Court House, in the City of Ithaca, New York, commencing on the 18th day of March, 1929.

Present: HONORABLE JOSEPH D. SENN, Justice.

SUPREME COURT—TOMPKINS COUNTY

MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

Plaintiff,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant.

The issues in the above entitled action having duly come on for trial at a trial and special term of the Supreme Court of the State of New York, held in and for the County of Tompkins, at the County Court House in the City of Ithaca, New York, before Honorable Joseph D. Senn, Justice, and a jury, and the jury having duly rendered a verdict in the above entitled action in favor of the plaintiff and against the defendant for the sum of $7,257.60 on the 22nd day of March, 1929, and the defendant having thereafter duly moved to set aside said verdict and for a new trial on all the grounds stated in Section 549 of the Civil Practice Act except inadequacy, and the Court having then directed that attorneys for plaintiff and

40 defendant submit briefs and briefs having been submitted by Stagg & Heath, of counsel for the plaintiff, and by Cobb & Cobb, attorneys for the defendant, and due deliberation having been had and the Court having rendered an opinion dismissing the motion to set aside the verdict and for a new trial as hereinabove set forth;

Now, on motion of Daniel Crowley, attorney for the plaintiff, it is

Ordered that said motion be and the same hereby is denied.

Dated Feb. 1, 1930.

Enter JOSEPH D. SENN,

41 Justice Supreme Court.

NOTICE OF APPEAL FROM JUDGMENT.

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

Plaintiff,

42 vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant.

Please take notice that the defendant above named hereby appeals to the Appellate Division of the Supreme Court for the Third Judicial Department from

the judgment for the sum of $7,257.60 with costs and interest on said verdict amounting to $487.51 entered in the office of the Clerk of the County of Tompkins on the 19th day of February, 1930, and from each and every part of said judgment.

Please take notice also that the defendant intends to bring up on such appeal every question of law and fact which may be reviewed herein.

COBB & COBB,
Attorneys for Defendant,
Office and P. O. Address,
Savings Bank Bldg.,
Ithaca, N. Y.

To—

Daniel Crowley,
Attorney for Plaintiff,
Office and P. O. Address,
City Hall,
Ithaca, N. Y.

Tompkins County Clerk,
Ithaca, N. Y.

NOTICE OF APPEAL FROM ORDER.

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

Plaintiff,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant.

Please take notice that the defendant herein hereby appeals to the Appellate Division of the Supreme Court for the Third Judicial Department from an order denying the defendant's motion for a new trial in the above entitled action, made upon all the grounds stated in Section 549 of the Civil Practice Act, except that the verdict was inadequate, which order was entered in the office of the Clerk of the County of Tompkins, New York, on the 4th day of February, 1930.

Please take notice that the defendant intends to bring up on such appeal each and every part of said order hereby appealed from.

Dated March 1, 1930.

COBB & COBB,
Attorneys for Defendant,
Office and P. O. Address,
Savings Bank Bldg.,
Ithaca, N. Y.

To—

Daniel Crowley,
Attorney for Plaintiff,
Office and P. O. Address,
City Hall,
Ithaca, N. Y.
Tompkins County Clerk,
Ithaca, N. Y.

49

SUPREME COURT—TOMPKINS COUNTY

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff,

against

LEHIGH VALLEY RAILROAD COMPANY,

Defendant.

50

At a Trial and Special Term of the Supreme Court in and for the County of Tompkins, at the City of Ithaca, N. Y., commencing on the 18th day of March, 1929.

Present: Hon. Joseph D. Senn, Justice.

APPEARANCES:

Daniel Crowley, Esq., appearing for the plaintiff.
Riley H. Heath, of Counsel.
Cobb & Cobb, Esqs., appearing for defendant.

51

By Mr. Heath: I offer in evidence Letters of Administration in the estate of Joseph Rocco and ask that they be marked Exhibit A.

Received without objection.

52 It is conceded that the tracks of the Lehigh Valley Railroad Company were used at the time of this accident by both interstate and out of state business, that is the tracks in question.

GABRIEL ROCCO, having been called as a witness in behalf of the plaintiff in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Heath:

53 Q. Gabriel, how old are you? A. Twenty-four.

Q. And you are the son of Joseph Rocco, the decedent in this case? A. Yes, sir.

Q. And how old was your father when he died? A. Fifty-eight.

Q. He died on the 8th day of December, 1927? A. Yes, sir.

Q. Your mother is living, your father's widow? A. Yes, sir.

Q. What is her first name? A. Mary L. Rocco.

Q. What children of the marriage are living? A. Four.

Q. Name each and give their ages, if you recall?

54 A. Gabriel Rocco, age twenty-four; Lena Rocco, age seventeen.

Q. That is the daughter? A. Yes, sir. Mary R. Tubbs, she is married.

Q. How old is she? A. Twenty-one.

Q. She lives in Danby, Tompkins County? A. Yes, sir. Anthony Rocco, age nineteen.

Q. That is a son? A. Yes, sir. 55

Q. At the time of this accident, all of the children lived at home with your father and mother except Mrs. Tubbs? A. Except Mrs. Tubbs.

Q. That is all the children? A. That is all.

Q. At the time of the accident, Gabriel, you were working for the Lehigh Valley Railroad Company? A. Yes.

Q. And you were working on the same section that your father was? A. Yes, sir.

Q. That is what? A. Section 25.

Q. What were you, a section hand? A. Section hand. I was operating a motor car. 56

Q. What is your mother's age? A. Fifty-four.

Q. This section 25 is on the Auburn Lake Road of the defendant, isn't it? A. Yes, sir.

Q. Runs from Ithaca to Auburn, N. Y.? A. Yes, sir

Q. And runs along the east shore generally of Cayuga lake? A. Yes, sir.

Q. And runs in a general northerly direction from Ithaca towards Auburn? A. Yes, sir.

Q. And you know where Stewart Park is? A. Yes, sir.

Q. That is the park that is here in the City of Ithaca at the south end of Cayuga Lake? A. Yes, sir. 57

Q. And this track goes by Stewart Park on the east and runs along the corner, south east corner, of Cayuga lake, does it? A. Yes.

Q. How long had you been working for the de-

fendant, that is on this section gang? A. A year
58 and eight months.

Q. How long had your father been working for the defendant? A. Between twenty and twenty-five years.

Q. How long had he lived here in the City of Ithaca? A. Thirty-three years.

Q. Just where did your father live at the time of the accident? A We lived on Esty street.

Q. Did you see your father at work? A. Yes, sir.

Q. And what work did your father do? A. He inspected the road and in case any culverts got
59 blocked up or defective rails and he filled up the lamps and saw that everything is in good shape and if it wasn't he had to fix it.

Q. On the road? A. On the road bed.

Q. Where did this section 25 extend to, how far north? A. As far as the Rock Salt mine.

Q. What time did your father go to work? A. 6:30 in the morning.

Q. And worked until what time? A. He worked until twelve and then went out at 3:30 in the afternoon and came in at eight.

Q. You know that of your own knowledge, do
60 you? A. Sure.

Q. And while he was out inspecting the track he was inspecting from Ithaca to the Rock Salt? A. Rock Salt Mine.

Q. And about how far is that? A. About seven miles and a half.

Q. What kind of trains used this track ? A. The

local freight three times a week and there is a pick-up every day and a passenger and sometimes extras. 61

Q. There was a passenger train that left Ithaca around 7:40 in the morning? A. 7:40 in the morning.

Q. Going towards Auburn? A. Going towards Auburn.

Q. And a passenger train came in from Auburn to Ithaca due at 12:23? A. Yes, sir.

Q. And then there was a passenger train due to leave Ithaca at 4:55 in the afternoon? A. Yes, sir.

Q. And one due back to Ithaca from Auburn when? A. 8:30.

Q. When did the local freight run? A. It ran three times a week, on Tuesday, Thursday and Saturday. 62

Q. December 8, 1927, was the Thursday, was it not? A. Yes, sir.

(Examination suspended temporarily.)

CARL CRANDALL, having been called as a witness in behalf of the plaintiff in the above entitled case, after being first duly sworn, testified as follows:

Examined by Mr. Heath:

Q. Mr. Crandall, you are a duly licensed surveyor of the State of New York? A. Yes, sir. 63

Q. And a part of the teaching staff of Cornell University in Civil Engineering? A. Yes, sir.

The qualifications of the witness is conceded.

Q. At the request of Judge Crowley did you take

and cause to be taken measurements of the Lehigh
64 Valley Railroad Company's right of way and tracks as they proceed along the southeast corner of Cayuga Lake down near Stewart Park? A. Yes.

Q. When did you do that work? A. On the several days along about the 14th of March.

Q. This year? A. Yes, sir.

Q. From your measurements and the data that you obtained there by transit and other instruments of your profession you have made a map, Exhibit B, have you not? A. Yes.

Q. And does Exhibit B correctly portray the situation down there on the defendant's right of way
65 from the approach to the south of Rapuzzi's hotel on north to the Remington Salt plant? A. Yes.

Q. And this map is at scale? A. Plotted to scale one inch on the map is equal to sixty feet on the ground.

Q. One inch on the map is equal to 60 feet on the ground? Is that right? A. Yes, sir.

Q. And objects that are located on this map are they correctly located? A. Yes, sir.

By Mr. Heath: We offer Exhibit B in evidence.

By the Court: It is received in evidence subject to any corrections.

66 Q. Now, Mr. Crandall, will you explain this map to the jury and to the Court so that we can interpret it? A. The map covers the territory from the bridge across the creek at the southerly side of Stewart Park.

Q. What is the name of that creek? A. It has no particular name. In a direction that is generally northerly down to the Remington Salt plant. That

is a total distance or 3378 feet by the way of the track. The alignment is curving. The track crosses the bridge, the lower edge of the park on a straight tangent and about two-thirds of the way between the creek and the old Rappuzzi hotel begins to curve to the right. That curve ends just beyond the present road entrance into Stewart Park and there is a short stretch of straight track for a little distance there and then a long curve to the left begins. That long curve starts just south of Mr. Stevens' place and continues on by the boathouses and ends a little ways outside of the city limits. There is a short stretch of straight track there and a flat curve and finally a straight track by the Remington Salt plant. There are two curves, one by the Rappuzzi hotel and another curve begins just south of Stevens and passes along by the boathouses and ends just north of the city line. The topography along the side of the track begins first at the old Rappuzzi hotel where the street railway stops. 67 68

Q. The Rappuzzi hotel is the building that you have located here (indicating) and marked hotel? A. Yes, sir.

Q. It doesn't say Rappuzzi hotel on the map but that is the only hotel shown on the map, that is the Rappuzzi hotel? A. Yes, sir. On this west side of the track there is quite a heavy growth of trees that is mostly elm trees and that is indicated on the map. On the east side across from the elm growth is an old hedge adjoining the hotel and there are a number of poles and signs of various kinds indicated along on both sides of the tracks. Right at the corner of the 69

70 track joins the lake shore and west of the railroad there is a large growth of willow trees sixteen to twenty-four inches in diameter and those are shown because they affect the view from the tracks. Further north reaching the Stevens property the railroad passes on a sort of embankment between the lake and the ditch. The level of the track is about five or six feet above the level of the lake and the ditch.

Q. The Stevens property is indicated on the map, isn't it; it is on the east side of the track? A. Yes, sir.

Q. That is Fred Stevens' property? A. I don't
71 know his first name.

Q. Do you recognize him sitting there next to Mr. Rocco? A. Yes, sir.

Q. And then this ditch along the east side you say is about five feet below the top of the track ? A. It is.

Q. Go ahead. A. It is almost on lake level, a little above, because there is a fall from that ditch into the lake. Near the south line of the Stevens property there is a plank bridge across the ditch and there is a pigpen along the ditch as indicated on the map and on the west side of the track over about opposite the plank bridge north to the first point the
72 west side of the track has a sort of a willow hedge that grows up about five feet in height and fills in between the track and the edge of the lake. The next topographical point north of the Stevens property is on the west side of the railroad. A point has been plotted out into the lake enclosed by a concrete wall and upon that point is a boathouse as indicated on the map and a number of willow trees some of them

growing up to a considerable height. Still farther north is a row of boathouses, about a dozen in all, 73
the north one of which is commonly referred to as the stone boathouse where a boathouse is built out of cement blocks and in addition to these boathouses there are a number of sycamore, willow and locust trees growing there. Some of the boathouses are quite high, twenty feet or more and some of them not more than twelve or thirteen feet in height.

Q. How close are they generally to the track? A. The distance isn't marked on the map. The scale is one inch to 60 feet and it averages about half an inch so that I should say about thirty feet on the average. The north one is a little farther away from the track 74
than that.

Q. That is thirty feet between the boathouses and track? A. Yes, sir. The boat houses are in close together and just beyond the boathouse is a whistle sign, a large "W" on an iron post set on the west side of the track.

Q. Is that indicated on the map? A. Yes, sir, that is indicated on the map, and it is located 1252 feet south from the south end of the main building of the Remington Salt plant and it is 852 feet south from the whistling sign to a point marked with an "X" on the map midway between the Stevens fence 75
corner and a duck pond and it is 253 feet from that point marked with an "X" southerly along the track to a certain willow shown on the map, being the first willow north of the pumphouse on the east side of the railroad and 366 feet from that willow southerly to a point opposite the street railway stop south of

the Rappuzzi hotel and 655 feet from the street railway stop to the north end of the bridge. The total distance from the north end of the bridge up to the cross between Stevens' fence corner and pigpen is 1274 feet.

Q. What is the distance from the whistling post and the highway crossing into Stewart Park? A. That would be 852 feet plus 253 plus 366.

Q. 366 takes you back of the Rappuzzi hotel? A. Yes, sir.

Q. I ask you about the crossing, the one road entrance to the park? A. If you take that you would have to take about 150 feet from the center of those three distances.

Q. From the whistling post south we had 852 plus 253 plus 216? A. Yes, sir. This measurement is to the center of the crossing.

Q. This road that you have marked here as the road entrance to the park is a public highway, is it not; Stewart Park is a public highway? A. The present entrance to the park.

Q. And has been for years and years? A. Yes, sir.

Q. And is a public highway? A. Yes, sir.

Q. On the map you have the figure 852 bounded on each side of the road line, that 852 is the distance along the track? A. Yes, sir. All distances are measured along the track.

Q. Did you observe as you stood on the track on the right of way of the defendant as to the view that you could obtain or did obtain looking north in relation to this curve? A. Yes.

Q. And will you tell us about that? A. Of course the length of view that one gets depends on the exact location and it would be determined at any place along the map by laying down a straight edge but in general any point along by the Stevens property you can't see much more than 250 feet or something like that to the north because the view is shut off in the inside curve by the boathouses, trees and also that five foot willow hedge that I spoke of. 79

Q. And as you are approaching the Stevens property from the south did you observe as to whether or not you could see around this curve? A. There is a place in between the entrance to Stewart Park and the Stevens property where you go north where you can see past the boathouses and see a stretch of track. 80

Q. In other words standing just south of Stevens' property as you say, between the Stevens property and the highway and look to the west of the boathouses and diagonally across the corner of the lake across a stretch of water? A. It would be quite a little bit south of the Stevens house somewhere along by the pump house you can look across this obstruction and see this stretch of track.

Q. When you say in front of the tracks, you say west? A. Yes, sir. 81

Q. They face on the lake? A. Yes, sir.

Q. But even from that point can you see the rails as they go around this bend? A. No, you don't see any of the bend at all.

Q. The fact is that the bend cuts off the view of the rails as you are back south of the bend even

way back to the pump house you can't see around
82 this curve in point? A. No, what you see is a stretch of track beyond that.

Q. That is out, quite a way out towards the Remington Salt plant? A. That is right.

Q. Now this "X" mark that you have referred to and that appears on Exhibit B east of the duck pond or ditch and along defendant's right of way, you see that on the map? A. Yes, sir.

Q. That point was indicated to you by Mr. Stevens, was it not? A. Yes, marked on one of the ties there.

Q. That is between the duck pond and the Stev-
83 ens property? A. No, the mark is along the tracks on the right of way but the mark is just west of the duck pond along the right of way and the mark is on the right of way. It is on the east end of the tie.

Q. That was indicated to you as the place of the accident? A. Yes, sir.

Q. As you approach this curve from the south you can't see around it, can you? A. No.

Cross-examination by Mr. Cobb:

Q. That would be equally true of a train coming,
84 the engineer couldn't see around it? A. No, he couldn't see around it.

Q. Which one would you say had the better view, the man on the track or the engineer?

By Mr. Heath: Object to that unless the witness made the test.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. The engineer would have the better view.

Q. Would it be easier for the engineer to see a man or a man to see the train? A. With respect to the relative size of the objects, the engineer would have the better view. That was based on the fact that a good many of these obstructions were low. Ordinarily at the height of five feet and would obstruct a man's view sitting on a hand car but wouldn't bother the engineer on a train.

Q. But those buildings as the engineer approached that going south would prevent his seeing the man on the track, most of them high enough? A. Most of them are high enough to obstruct the view of the engineer.

Q. The train of course would be much larger than a man? A. Yes, sir.

Q. It would be easier to catch a glimpse of that train than it would be to catch a glimpse of a man? A. Yes, sir.

Q. At Rappuzzi's hotel, the crossing at Stewart Park up to the Stevens property Rocco as he approached that track could have seen down towards the Salt plant?

By Mr. Heath: Object to the form of the question.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. As I stated before at one point near the pump house where you get a glimpse of that track down to the Salt plant but you couldn't see west of this obstruction.

88 Q. But as a man would proceed from this crossing along to the duck pond, if he looked, he could look west of any obstruction and see down to a point where the track proceeded from the Salt plant to this curve? A. Not any wheres near the duck pond.

Q. The duck pond is where? A. Right there (indicating).

Q. That is we will say as he proceeded from a point where this highway crossing crossed the railroad about 350 feet north along the track couldn't he look past any obstruction and see the track down here (indicating) quite a ways? A. Yes, sir, he 89 could get a view beginning a little ways north of the Stewart Park entrance to a point north of the pump house but not by the Stevens property or the duck pond.

Q. We will say to a point we will say 300 feet from this road crossing? A. That would be five inches on the map. That is too much.

Q. Here is 350 feet where you say there is a sign. This is 350 feet? A. No that is 35 sign. There is a certain metal sign with 35 on it.

Q. Even at that point which is six or seven inches or six times, say 360 feet, you say that one 90 couldn't look across there and see a train anywhere between the curve and the Salt plant? A. I doubt it as far north as that 35 sign because that is where that hedge begins.

Q. There is no hedge there. A. If you went a little bit south of the sign you might be able to see by it.

Q. That line of vision would carry you to a point how far would you say north of the Salt block? A. From a point just south of the 35 sign? 81

Q. Yes. A. It would start in about 600 feet south of the Salt block and about the same or almost the same distance north of the cement boathouse.

Q. At the time you were there, professor, this Stevens house had burned down, hadn't it? A. Yes, sir, the fence lines of the side of the property are indicated on the map.

Q. There was no house there when you made this map? A. There is a house right there near the plank bridge but I have been informed it has been built since the time of the accident so I didn't locate it. 82

Q. But the house he lived in was further east? A. The house he lived in was further east; that was burned.

Q. I wish you would look at Exhibits one and two and see if you recognize those photographs? A. Yes, sir.

Q. That is a photograph in each instance of the location down there at the corner of the lake? A. Near the Stevens property and both looking north.

Q. Would you say that those were fair representations of what they portray there, as far as the lay of the land? A. No, 1 is a fairer picture of it than No. 2. Both are actual photographs but No. 2 is taken at such a particular point that it doesn't show up that hedge on the west side of the track as No. 1. 83

Q. The general lay of the conditions there it

shows up? A. Yes, sir. No. 2 makes it appear as
94 though the hedge didn't amount to much.

Q. Taken nearer to the hedge? A. Yes, sir.

Q. Do you recognize that man shown in the picture? A. Yes, sir.

Q. Who is it? A. Mr. Stevens.

Re-direct examination by Mr. Heath:

Q. I didn't ask you anything about elevations. No. 2 appears to show that that curve is banked; do you know about the ground elevation? A. In a general way. Any railroad track on a curve is elevated.

Q. Was it? A. Yes, sir, decidedly elevated. I
95 didn't measure the exact amount but it is a very considerable number of inches.

Q. And the stone boathouse was equally elevated at No. 2 that you have there. Which one is the stone boathouse, does it show? A. You can't see it very well but in the extreme background of the picture higher than the others immediately adjoining the south side of the cement boathouse, I remember as the building abutting the south side of the cement boathouse.

Q. Exhibit 2 is taken 100 feet east of the point of the accident and I assume that means south. As
96 you proceed from a point where this photograph No. 1 is taken north-west, state whether or not you observed these willows become more of an obstruction? A. I think photograph No. 1 is a fair representation of the hedge along the west side of the track just about high enough to obstruct the view of a man sitting on the hand car but if the man was

standing up walking he could pretty well see over it.

97 Q. As you proceeded northerly did you observe as to whether your view would be more obscure or not? A. As you proceed northerly you encountered not only obstruction of hedge but of houses and trees and conditions get worse and worse as you go along.

Q. The view from the south isn't shown here. Both these pictures are looking north? A. Yes, sir.

GABRIEL ROCCO, recalled and examined further by Mr. Heath.

98 Q. What time of day, Gabriel, did the local freight run on this track? A. No certain hour. They came along from Auburn and pick up one car from one place and another from another and go like that.

Q. Do you know what time they start from Auburn? A. Start in the afternoon.

Q. They start in the afternoon and pick up freight as they had it to pick up and came on towards Ithaca? A. Yes, sir.

Q. On no particular schedule, is that right? A. That is right, on no particular schedule.

99 Q. And when would they go back? A. Just as soon as they would pick up their freight. If they are all ready, hook on and turn around and hook on the engine and go back.

Q. Go back in the afternoon? A. Yes, sir.

Q. The pick up that you speak of left Ithaca and went down to Portland Point and back? A. Went to Ludlowville.

Q. It was a sort of combination freight and
100 passenger taking workmen down to the industries along the lake? A. Yes, sir.

Q. And bring them back at night; is that right? A. Yes, sir.

Q. And when did that go down in the morning? A. When they got quite a lot doing down there, then an extra frieght goes down about 5:30 in the morning and come back before the passenger goes out and after the passenger goes out about an hour and a half difference, they pick up another load and do their switching.

Q. At Ludlowville? A. At Ludlowville and
101 Portland Point.

Q. Out in the forenoon, came back in the forenoon and went out in the afternoon and came back in the afternoon, is that right? A. Yes, sir.

Q. And carried freight of all kinds and these passengers, employees, is that so? A. Yes.

Q. Who was the foreman of that section gang? A. Thomas McCarthy.

Q. Where were you and the gang on the day of the accident? A. We was working towards Auburn on a wreck crew, a work train and at the time of the accident we was between Lavana and Aurora.

102 Q. Way down the line toward Auburn? A. Yes, sir.

Q. What was the condition of the track that day? A. It was a heavy wind, washed out the roadbed of the road.

Q. That is you mean the wind had stirred up the waves of Cayuga Lake and washed out some of the

parts of the railroad bed? A. Yes, sir.

Q. That work you were doing with the section gang with Mr. McCarthy with the gang repairing the track? A. Yes, sir. 103

Q. Did this passenger train going toward Ithaca pass you? A. Yes, sir.

Q. And where were you and Mr. McCarthy when it passed? A. On this side of Kings Ferry or on the other side.

Q. Down near Kings Ferry? A. Yes, sir.

Q. You were way north of this curve? A. Yes, sir.

Q. How many miles it is from Ithaca to Lavana? A. It is about twenty to twenty-eight miles. 104

Q. North of Ithaca? A. Yes, sir.

Q. And Mr. McCarthy, the section boss down there with you at the time of the accident? A. Yes, sir.

Q. He was the section boss of your father, was he not? A. Yes, sir.

Q. What time were you down at Lavana and Kings Ferry? A. I just can't remember what time it was. We was keeping on working down that way. It must have been around—I just can't remember.

Q. You went out to work that morning with the gang about what time? A. Seven o'clock. 105

Q. Did you start then with the gang out towards Auburn to repair the tracks? A. Yes, sir.

Q. And had been working all day? A. Worked until 10:30 that night.

Q. Do you know what time this passenger train that came in towards Ithaca passed you down by

Kings Ferry? A. It must have been close to 3 o'clock, 2:30.

Q. In the afternoon? A. Yes, sir.

Q. It was in the afternoon? A. Yes, sir, it was in the afternoon.

Cross-examination by Mr. Cobb:

Q. Rocco or Gabriel, had you ever acted as a track walker before your father died? A. Yes.

Q. And did you take an examination before you did that? A. I took the examination to run a motor car.

Q. At times when your father didn't work did you take his place? A. Yes, sir.

Q. All of the time of course? A. Yes, sir.

Q. When you took the examination did they instruct you on the rules?

By Mr. Heath: Objected to as incompetent, improper and immaterial what they did with this witness.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir.

Q. Where did you go to do that? A. Auburn.

Q. Who examined you? A. I don't know his name.

Q. Was it Mr. McGuire?

By Mr. Heath: I assume this is all under my objection.

By the Court: It is, what they did with this one witness.

A. It is a kind of long faced fellow.

Q. You didn't know his name? A. I don't know his name.

109

Q. Did you know his title, what was he called, what was his business, trainmaster or what? A. That is the first time I ever saw him. I never saw him before.

Q. Do you know whether your father was examined before he commenced to track walk on the rules and instructed? A. I don't know. He never went there to be examined that I know of.

Q. Do you know his signature? A. I know his signature.

Q. I am going to show you a paper purporting to have his signature on and ask you if you recognize that? A. That is his signature. When was that?

110

Q. Look at it? A. 1926.

Q. Did you know about his being to Auburn then? A. I don't know about his being down there.

Q. Did he tell about his being there and being examined at that time? A. No, he didn't tell me.

By the Court: What date is that, Mr. Cobb? A. Nov. 13, 1926.

Q. You say you took your father's place and you did some track walking on this speeder? A. We changed off, filling lamps, switch lamps. That is the only time I ever changed off with him.

111

Q. You told me that you never had taken his job before the time on this speeder and gone down as far as the salt mine and inspected the track in ahead of the 4:50 train? A. I went down to fill the lamps.

Q. Was he with you? A. Yes, sir, I went alone and he came back and went on.

112 Q. What do you mean by that; you took the speeder and went out with that? A. He got ahead and inspected the road to see if everything was all right.

Q. I am talking about the 4:50 train. Do you mean you did this ahead of this 4:50 train? A. I am trying to say just what I am doing.

Q. I want to find this out about this 4:55 train. A. I came down and I took the car and went down and filled the rest of the lamps.

Q. Where? A. Junction, signal 4.

Q. Where? A. Down by the condensary.

113 Q. You mean by the station? A. No, just where the train goes down and backs in the station.

Q. I don't know what you mean by the station. I mean did you ever take this speeder ahead of 4:55 passenger that left Ithaca for Ludlowville and go and inspect this track for your father? A. No.

Q. You didn't? A. No.

Q. Who was the supervisor of track? A. Mr. Pierce.

Q. What is his first name? A. Ernest Pierce.

Q. The day you went down there with McCarthy as you were telling counsel, the banks were washed
114 out, was Pierce with you? A. Yes, sir.

Q. Was that before the accident? A. Yes, sir.

Q. You went down there early in the morning, 7 o'clock? A. 7 o'clock.

Q. And fixed this track up as far down as what point? A. Working towards Auburn.

Q. You got down how far? A. Lavana.

Q. Where is that with respect to Kings Ferry? A. What is that? 115

Q. Where is that with reference to Kings Ferry? Do you know? A. I don't just know.

Q. Which side of Kings Ferry, north or south? A. South.

Q. Lavana is south? A. Lavana is north.

Q. You went below Kings Ferry? A. Yes, sir.

Q. How many miles, three or four? A. It might be around fifteen or so, not less than fifteen.

Q. Below Kings Ferry? A. Yes, sir.

Q. Towards Auburn? A. Yes, sir.

Q. Did you go as far as Union Springs? A. I am kind of mixed up between Union Springs and Lavana. 116

Q. Is this the first time you were ever down there? A. I went down there three or four times.

Q. You don't know just where those stations are located? A. Yes, sir.

Q. Did you go north of Aurora that day? A. Yes, sir.

Q. Did you see this passenger train that left in the morning going down that day? A. Left towards Auburn.

Q. Yes. A. Yes, sir.

Q. Where were you then? A. We were working on the road. 117

Q. Where? A. I can't just remember where the point was.

Q. What did you do, have a motor car? A. No, working on train.

Q. You had a train with you? A. Yes, sir.

Q. That must have been on a siding? A. Yes, sir.

118

Q. Where? A. I don't just know because I can't remember that far.

Q. Was it late when it went down? A. I don't remember.

Q. Had you found some washouts before the train came along? A. We started finding quite a few washouts in Kings Ferry section and Ludlowville.

Q. Find any ice? A. No, sir. Ice I saw down at Aurora.

Q. You saw ice down at Aurora? A. Yes, sir.

119

Q. What did you do, chop it off? A. Not enough to bother and we kept on fixing up the washouts.

Q. Was it a very cold day? A. Pretty snappy.

Q. Freezing? A. Yes, sir.

Q. Heavy wind? A. Yes, sir.

Q. Waves were rolling high? A. The waves were rolling high, the lake was pretty high.

Q. You can't tell me where you were working where your train was on the siding when the train went by? A. Yes, sir.

Q. When it went back? A. We were on the siding.

120

Q. Where? A. The siding down by Aurora I think it was, that is at night.

Q. You mean in the afternoon? A. Night when she was going the other way.

Q. Going back towards Ithaca? A. Yes, sir, going back towards Ithaca.

Q. Where were you when the train was going

back towards Ithaca? A. Either between Kings Ferry or around there somewhere. It was on the Kings Ferry section. 121

Q. You say it was about two or after two? A. Yes, sir.

Q. You stayed there and kept doing some work? A. Yes, sir, kept going towards Auburn.

Q. What time did you leave that night? A. 10:30 we got home.

Q. Then you must have been there when this passenger train went to Auburn? A. Yes, sir. I remember there was an electric went back to Auburn because the train didn't go back.

Q. The passenger train went back? A. Yes, sir. 122

Q. Do you remember what time it went past you? A. It was late. I don't remember what time it went by.

Q. You say there was a pick-up freight train that ran Tuesday, Thursday and Saturdays? A. Yes, sir.

Q. Every week? A. Yes, sir.

Q. Where did that train start from? A. Auburn.

Q. And where did it go to? A. Towards Ithaca.

Q. Did it go clear to Ithaca? A. Sure, it is a local freight from Auburn.

Q. It didn't run on any particular schedule? A. They make up the schedule in Auburn. 123

Q. That train always ran on the dispatcher's orders at Ithaca? A. Yes, sir.

Q. Who was the dispatcher in Ithaca after 8 o'clock? A. After 8 o'clock?

Q. Yes. From 8 o'clock through the day, do you

know who it was? A. John Clapp.

124 Q. Do you know him? A. Sure.

Q. Your father knew him? A. Yes, sir.

Q. So that that dispatcher there had control of the trains on that line? A. Yes, sir.

Q. Your father knew that? A. Yes, sir.

Q. You knew he knew it? A. Yes, sir.

Q. So that if this freight was on the track and the passenger train was coming that dispatcher told the conductor of that freight train where to go off on a siding? A. Yes, sir.

Q. The pick-up train was never to interfere with the passenger train that you knew? A. Yes, sir.

125 Q. The passenger train had the right of way? A. Yes, sir, sure.

JOHN KISH, having been called as a witness in behalf of the plaintiff in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Heath:

Q. John, you live where? A. 713 West Green Street, Ithaca, N. Y.

Q. What is your business? A. Laborer.

126 Q. Where do you work? A. I work for the Lehigh.

Q. And how long have you worked for the Lehigh Valley? A. I started 1920, the 7th of June.

Q. Where do you work? A. I work for the section on Auburn Branch, section 25.

Q. What kind of work do you do? A. Repairing the road.

Q. With the section crew, the section hands? A. Yes, sir. 127

Q. Was there a time that you had this job that Mr. Rocco had? A. 1921, 7th of February.

Q. Until when? A. I can't tell that, I been on five years.

Q. As I understand you quit because of your health? A. My heart bother me.

Q. After you quit as track inspector you still worked on the section? A. With the same gang.

Q. Mr. McCarthy was the boss? A. Yes, sir.

Q. You knew Mr. Rocco? A. Yes, sir, I know him.

Q. Mr. Rocco went on the job as track inspector when you left? A. No, he was the second man after me. 128

Q. How long had he been on as track inspector? A. I don't know. Right on about a year after I left. He had been on before I was.

Q. He was track inspector before you went on? A. Yes, sir.

Q. In any event the last time he went on as track inspector was about a year after you left as track inspector? A. Yes, sir.

Q. Do you know what hours he worked? A. He worked ten hours, 6:30 in the morning to 12 and 3:30 in the afternoon to 8:00. 129

Q. Do you know what work he did? A. Inspected the road, cleaned the culverts and fixed the road.

Q. When he went to work at 6:30 what did he

do, where did he start? A. He started out of the
130 tool house.

Q. At Ithaca? A. Yes, sir.

Q. And out along the line? A. Yes, sir, going north.

Q. While he was out until he came back at 12 o'clock, what was he doing? A. Some times have to work with the gang and go through the work for us.

Q. When he was out along the track he inspected it as to loose bolts, condition of the ties and culverts, is that right? A. Yes, sir.

Q. About this local freight, John, Gabriel testified that it was a local freight that came over this
131 line? A. Three times a week.

Q. You knew about that? A. Yes, sir, I know about that.

Q. And it left Auburn and came to Ithaca and then went back? A. Yes, sir.

Q. And then there was this pick up, that is different from the local freight? A. Yes, sir, I know it.

Q. The pick up went down to Ludlowville? A. Yes, sir.

Q. Do you know what the pay was per month? A. $112.00 for the month.

132 Q. Ten hours a day? A. Yes, sir.

Q. I am going to ask you, John, the attorney for the defendant in opening this case before the jury stated if a train was late it wasn't Mr. Rocco's duty to go out on the track. I want to ask you what did Mr. Rocco do, what do you say he did in relation to going to work.

By Mr. Cobb: Object to that as incompetent, improper question not in proper form. 133

Question withdrawn.

Q. Mr. Kish, did you ever know of a time when Mr. Rocco was on there as track inspector when the trains were late leaving Ithaca? A. I never know on what time it was late, I know what time he go out.

By Mr. Cobb: Objected to as not responsive.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

Q. When did he go out? A. 6:30 in the morning, came back 12 o'clock; 3:30 go out, come back 8:00 o'clock. 134

Q. If the trains were late in leaving Ithaca, did that make any difference? A. He had to go and inspect the road.

Q. Even when trains were late? A. Even then.

Q. Other trains were using this track besides passenger? A. Yes, sir.

Q. Local freight? A. Yes, sir.

Q. And the pick-ups? A. Yes, sir.

Q. And was that true while you were track inspector did you go out the same hours? A. I go out same hours, that is what I know about it.

Q. How long you know that section, how long you been working there? A. Work ever since 1920. 135

Q. From 1920 down to the date of this accident did you know when track inspectors went to work? A. I know.

Q. When did they? A. 6:30 in the morning; 3:30 in the afternoon.

186 Q. Over this period if the train is late when did he go? A. Same time.

Q. 6:30 in the morning? A. Yes, sir, can't wait, the others come in and have to go.

Q. To inspect the track? A. Yes, sir, to inspect the track.

Q. You know this curve down there at the corner of the lake? A. Yes, sir.

Q. That curve was there when you were inspecting the track? A. Yes, sir.

Q. And you knew of it during the year or two that Joe was track inspector? A. Yes, sir.

187 Q. You went over it pretty near every day? A. Yes, sir.

Q. Did you observe as you went north whether you could see around the curve? A. No.

Q. What do you mean? A. I couldn't see.

Q. You did look to see? A. Yes, sir.

Q. Could you see around the curve? A. No.

Q. Is this the general condition down there, John, the lay of the land and the buildings, posts and willows and water the same now as far as you know when they were at the time of the accident? A. Yes, sir.

188 Q. The Stevens house where Fred Stevens lived, you know where he lived? A. Yes, sir.

Q. He had a house up on the road? A. Up on the highway road.

Q. The road goes down past Percy field? A. Yes, sir.

Q. That burned, didn't it? A. Yes, sir.

Q. That wasn't down near the railroad track? A. No, sir. 139

Q. It burned since this accident? A. Yes, sir.

Q. Now, what did you notice when Rocco was working there as to the speed with which he could get over the track and do the inspecting in relation to the kind of weather it was? A. It didn't make any difference.

Q. How fast? A. When the wind blew against the speeder it would take longer to go over the track.

Q. And if there were defects or things wrong with the rails or the track bed, that would take longer? A. If the rail all right and nice day, it would take forty-five minutes. 140

Q. If there were defects in the tracks or ties or bed he had to fix it? A. He had to fix it, he had to stop to fix it.

Q. No matter how long it took? A. No matter.

Q. I will ask you if you observed what the trains did as they came down and came into this curve by Fred Stevens', what you observed what the trains did? A. They blow the whistle.

Q. Over how long a time that you know did they do that? A. Since I work over there.

Q. That is if a train was coming south, that is what you mean? A. Yes, sir. 141

Q. On this day in question you went down to Aurora? A. Yes, sir.

Q. With the gang? A. Yes, sir.

Q. McCarthy was boss? A. Yes, sir.

Q. Do you know whether or not this passenger train coming from Auburn to Ithaca, due at 12:23

was late or not? A. I don't know; it came by us.

142 Q. Where were you? A. Kings Ferry lying on some of them siding.

Q. About what time of day? A. Little after two.

Q. This train that was due in here at 12:23? A. Yes, sir.

Q. About how far from Ithaca? A. Passed me at Kings Ferry, that is around twenty-one miles.

Cross-examination by Mr. Cobb:

Q. John, are you working for the Lehigh now? A. I expect to go back; I no quit; I stayed home on
143 account my wife sick six months.

Q. What time you stop work? A. October.

Q. When? A. 1928.

Q. You haven't worked since? A. No.

Q. You stopped on account of health? A. My wife's.

Q. Your health all right? A. My health all right now. I didn't stop this time for my health, account of wife's.

Q. You stopped track walking on account of your health? A. I stopped track walking on account of my health, heart bothered.

144 Q. What was the matter? A. Catch too much cold, some fever set up, week or two weeks.

Q. You say you stopped in 1926? A. 1928.

Q. You stopped track walking when? A. I don't remember the date. I start 1921, I been on five years.

Q. When did Rocco come to work? A. He come

after the year I left, the man after I left named John Peresine, he take the job. 145

Q. Can you spell it? A. No can spell it, some Swedish fellow.

Q. He went on right after you left? A. Yes, sir.

Q. Had he inspected any track? A. He didn't inspect it while I was on, he work for the gang.

Q. You say Rocco inspected? A. Rocco inspected before I went on.

Q. When you left as track walker after about five years who was the train dispatcher down at the Lehigh station? A. John Clapp.

Q. You knew him? A. Yes, sir.

Q. When you were working there how did you find where the others were? A. I go over in the morning and get the orders. 146

Q. What do you mean? A. Go to the station.

Q. What for? A. Find out anything coming.

Q. Who did you ask? A. I ask the ticket agent, morning and afternoon, John

Q. John Clapp? A. Yes, sir.

Q. Why did you do that?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff. 147

A. Have to do that.

Q. Why? A. That is my orders.

Q. Who did you get that from? A. Mr. Pierce and Mr. McCarthy.

Q. You didn't have to go to work until you got

orders where the trains were? A. No.

148 Q. You have to find out where the trains were? A. I have to find out.

Q. At the station? A. Yes, sir.

Q. If you didn't go over did you call up? A. When I didn't go over.

Q. Did you ever go without calling up?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

Exception taken for the plaintiff.

A. I never went without an order.

Q. What was the penalty if you went without

149 an order?

By Mr. Heath: Objected to.

By the Court: Objection sustained.

Exception taken for the defendant.

Q. Did this passenger train at the time you inspected the road leave Ithaca at 4:55? A. Yes, sir.

Q. Before that train left in the afternoon what was your duty at the time you were there, before you left? A. At 3:30 I had to go out ahead of the passenger.

Q. Before you went on duty what did you do about the trains? A. I go to the station to find out.

150 Q. And were those your instructions? A. What do you mean?

Q. Were those the orders? A. The ticket agent or John Clapp.

Q. You don't know when Rocco went to work as track walker after you left? A. No, he go the same time I go. He got the same duty I got.

Q. He had your same job? A. Yes, sir, and he had my same pay, too. 151

Q. Do you know just what day he started after you left? A. I don't know anything about that. I know he had to go at 6:30 and 3:30.

Q. You don't know the exact day when Rocco started to work as track walker after you left? A. No.

Q. John, I am going to show you a couple photographs, did you ever see those photographs? A. I don't know much about it.

Q. You know Stevens when you see him? A. Yes, sir.

Q. See if that is him, Exhibit 2, is that him? A. Yes, sir. 152

Q. Where is he standing there? A. I don't know, I can't tell.

By Mr. Heath: Objected to as improper cross-examination.

By the Court: He is making him his witness.

Q. Where is he standing? A. I don't know.

Q. He is on the railroad track? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. And you are sure this is Stevens? A. Yes, sir.

Q. What is this building down here (indicating) with those stacks? A. Remington Salt Block. 153

Q. Did you ever go over that track to the Salt plant? A. Yes, sir.

Q. Would you say that you recognize the lake shore and the buildings and the salt plant and the railroad track? A. I can recognize that all right.

Q. In Exhibit No. 1 what do you say about that, where is the Salt Plant there? A. Way back here (indicating).

Q. You mean it has got the stacks on it, is that right? A. Yes, sir.

Q. What would you say that was there (indicating), the white stuff there? A. That must be the lake.

Q. You have been over those railroad tracks? A. I look for the picture, I look for no map.

Q. You would say, looking at the pictures, you had been over those tracks a good many times? A. I been over there a good many times.

Redirect examination by Mr. Heath:

Q. You say you did go down and see the agent, Clapp, or whoever else was on the job and ask about trains? A. Yes, sir.

Q. When you went down there what did you say?

By Mr. Cobb: Objected to.

By the Court: Objection overruled.

Exception taken for the defendant.

A. He told me the train started out from Auburn late. If it was down to Ludlowville, I had to go just the same; it was my duty.

Q. You had to go just the same? A. Yes, sir.

Q. Was there ever a time when the train was late leaving that he told you not to go? A. No, sir, I have to go.

Q. When he told you the train was late leaving, what did he say? A. Sometimes he say I don't know anything, I didn't hear anything.

Q. Sometimes he didn't know? A. Yes, sir,

sometimes he didn't know.

Q. When he told you that he didn't know, what did you do? A. I go keep right on going. 157

Q. At 6:30 or 3:30? A. Yes, sir.

Recross examination by Mr. Cobb:

Q. You had to ask him first? A. Yes, sir.

Q. If you didn't ask him you disobeyed your orders?

By Mr. Heath: Objected to that as the orders are the best evidence.

By the Court: Orders are orders and custom is custom.

By Mr. Heath: I wish to introduce in evidence the American Experience Mortality Tables as to the expectancy of a man age 58, as 15.39 years. 158

By the Court: Received in evidence.

By Mr. Heath: I wish to introduce in evidence the rules of defendant company, the book furnished by the defendant, and I assume it is conceded that these rules were in effect at the time of the accident.

By Mr. Cobb: Yes.

By Mr. Heath: Page 21 under the title "Signals", title subject engine and motor whistle signals, page 19.

"The signals prescribed are illustrated by "O" short sound; "-" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed." 159

By Mr. Cobb: Object to that as incompetent, improper, on the ground that it doesn't apply to this decedent.

Discussion

By the Court: Received for what it may be
160 worth.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Heath: Subdivision D of Rule 14:

"(q) 0-0 running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal and approaching curves and other points where the employees may be at work on track or bridges."

By Mr. Cobb: Objected to as incompetent and improper, has no application on this single track road, nor does it apply to decedent.

161 By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Heath: Page 53, Rule 105. "Both the conductor and engineman are responsible for the safety of the train, the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection." Page 214, under heading, road, bridge and tunnel; switchmen Rule 1087: "Road, bridge and tunnel switchmen report to and receive instructions from section foreman."

162 By Mr. Cobb: Objected to as incompetent, improper and has no application to this decedent who was a track walker at that time.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Heath: Rule 1088, under same sub-heading:

"Road watchmen must carefully examine the track and roadbed and see that they are in safe condition; that all switches are properly set and locked for the main track, that cars left on sidings fully clear the main track, and that doors of all cars are secured. 'They must examine buildings and other property of the company and protect them from theft and fire.' Should the track be obstructed, the switchmen must display a stop signal in either direction from which trains may approach, and immediately notify the superintendent and section foreman." 163

By Mr. Cobb: Object to that rule as incompetent and improper and having no application here in this particular case where this decedent was involved. 161

By the Court: Under his objection I will admit the first part of their duty to examine track and roadbed and exclude the rest under objection.

By Mr. Cobb: My objection is to the rule generally, that it has no application.

By the Court: Objection overruled.

Exception taken for the defendant.

By Mr. Heath: Page 204, Rule 1028, under the heading enginemen:

"They must keep a constant and vigilant lookout for signals, observing their indication until passing them, classification signals on other trains; the position of switches and also obstructions and defects of track, and must frequently look back to see that the train is intact. They must stop and inquire respecting any signal not understood. Enginemen of engines running light must exercise great care in looking out for motor cars, handcars and trucks and 165

sound the whistle frequently at dangerous places, or
166 where the view of approaching trains are obstructed, to warn the employees using these cars of their approach."

By Mr. Cobb: Object to that as leading and on the ground it has no application here as far as this decedent is concerned.

By the Court: Objection sustained. You may have the second part in but the first one goes out.

Exception taken by the plaintiff.

GABRIEL ROCCO, recalled.

167 By Mr. Heath:

Q. Gabriel, I forgot to ask you as to the health of your father, what was his condition of health at the time of the accident? A. He was in good health.

Q. Was he working every day, every workday? A. Every day.

Q. He had been for how long? A. He had been for quite a while. Just been sick for once in a while, a day or two with a cold.

Q. But his general condition of health was good? A. Yes, sir, good.

168 Q. Was there anything the matter with his hearing? A. No, sir.

Q. Or his eyesight that you know of? A. No, sir.

FRED STEVENS, having been called as a witness in behalf of the plaintiff in the above entitled action, after being first duly sworn, testified as follows: 169

Examined by Mr. Heath:

Q. Mr. Stevens, you reside where? A. At the corner of the lake bordering Stewart Park.

Q. Cayuga Lake? A. Yes, sir.

Q. You have lived there how long? A. About seven years on that lot.

Q. You and your family lived in a house that was out on the lake road? A. We did.

Q. At the time of the accident? A. Yes, sir.

Q. And since the accident that house burned? A. Yes, sir. 170

Q. And you have erected another house that is down in closer to the railroad tracks? A. Yes, sir.

Q. Away from the highway? A. About 300 feet from the highway.

Q. But at the time of the accident in this case you had the house up on the road? A. Yes, sir.

Q. What do you call that, the lake road? A. The lake road.

Q. And you lived there how long? A. About seven years.

Q. What is your business? A. I am a collector of biology. 171

Q. You collect specimens for experimentation by biologists? A. Zoologists, entomologists and nature history.

Q. How long have you been doing that work? A. This is my sixth year.

172 Q. In doing that work you traverse the south end of Cayuga Lake a great deal? A. Yes, sir, for a radius of twelve miles.

Q. And throughout the year? A. Every day in the year that it is possible.

Q. You knew Joseph Rocco? A. I did.

Q. And how long had you known him? A. About fifteen years.

Q. And did you see him while he was working for the Lehigh? A. Practically every day.

Q. Your house, your property was north of this entrance, the old roadway into Stewart Park? A. About 300 feet.

173 Q. North of it? A. North.

Q. You have seen this map, Exhibit B, that is here, have you not? A. I have.

Q. There is a portion that is marked off as Stevens and that is your property? A. Yes, sir, it is 163 feet.

Q. 163 feet in width? A. Yes, sir.

Q. And as you go along the right of way from the entrance to Stewart Park going north towards your property you come to a place where there is a bridge over this pond or ditch that goes over onto your property; is that right? A. Yes, sir.

174 Q. And that is the bridge that you used in getting over from the lake across the tracks and onto your property? A. It is a bridge I built.

Q. That was there at the time of the accident? A. Yes, sir.

Q. What do you say as to the location of buildings, willows, etc., now as they were at the date of

the accident, December 8, 1927, with the exception of your house being burned? A. The accident—practically the same—the 8th of December, the shrubbery and willows, etc., would practically be the same. 175

Q. My question was more particularly the shrubbery, that was there as it is today? A. Yes, sir.

Q. The willows were there as they are today? A. Yes, sir.

Q. The buildings along the shore of the lake were there as they are today? A. Yes, sir.

Q. The general condition was the same? A. Yes, sir, the general condition was the same.

Q. You, I assume, have walked over this track and over this ground down there many, many times? A. I certainly have. 176

Q. And all during the time that you lived there, seven years? A. Yes, sir.

Q. Now, on the day of the accident, did you see Mr. Rocco? A. I did.

Q. And where was he when you saw him first? A. At the south boundary of the Rappuzzi hotel where the street car stops.

Q. Where the street car tracks come to an end? A. Where the street car tracks come to an end.

Q. Where was he, I mean by that where was he on the tracks or where? A. He was on the tracks coming north. He stopped there to button up his sheep lined or mackinaw, his coat. 177

Q. And was he on one of those push cars? A. He was.

Q. Describe that car? A. This car works with

a lever, not a foot lever, and he carried considerable
178 tools; I would estimate a big case, shovel, wrenches and different apparatus to the extent of perhaps 150 pounds, which is necessary in his work, repair work. The speed of the car? I have followed it many a day.

Q. No, I won't go into that, Fred. How far above the rails was the seat where he sat, about? A. I should say about, well, it would be not much higher than an ordinary chair because he would be sitting so that he could work his hands and if he were up high he couldn't do it. I imagine about 18 inches above the rails.

179 Q. Describe Mr. Rocco's physical characteristics, how large was he, a big man or a small man? A. He wasn't—he was a small man—I should say about well, I hardly think he would come five feet; I should think four feet and eight inches or something like that. He was a short man.

Q. Was he thick-set? A. Yes, sir, for his build. I would say he would weigh around 140 pounds, which is a good build for that height.

Q. When you first saw him was the push car in motion? A. Yes, sir.

Q. And going in what direction? A. North.

180 Q. And where were you and where had you come from, what were you doing? A. I had just left the railway bridge which goes over the creek going from the watershed on the east and flows through Stewart Park to the inlet. I had been there after some specimens for some traps beneath the bridge.

Q. That is where you had been? A. Yes, sir.

Q. That railroad bridge is shown on this map to the south of the Rappuzzi hotel? A. Yes, sir. 181

Q. You had been there. What were you doing, walking? A. Walking.

Q. And you were walking in which direction? A. When I saw Mr. Rocco?

Q. Yes. A. I had got my work done and started to walk north as he came along on the car.

Q. Did he pass you before he stopped at the street car ending? A. Yes, sir, perhaps ten or twelve feet. He gained on me and stopped there to button up his clothes.

Q. And did you have a conversation with him— not what was said, did you pass the time of day? A. Just passed the time of day. 182

Q. When you had this talk with him where were you with reference to the speeder then? A. Right beside the speeder.

Q. And you were facing which way? A. North.

Q. From there on, without my questioning you, won't you go on and tell the jury, not too fast, but distinctly so the jurors can hear, what you saw, what you heard, if anything, and what took place? A. That day there was a strong northwest wind blowing and previous to this day, I think the day before, we had some very high water. In fact I had about three feet of water in my boathouse, which is the stone boathouse that belongs to the city but I have charge of and the northwest wind washed the track out several places down the line. 183

Q. It washed the track out? A. Yes, sir.

Q. This is a single track road? A. It is.

Q. And the track parallels and goes along adja-
184 cent to the east edge of the Cayuga Lake generally as it goes north? A. Yes, sir.

Q. And in some places comes over very close to the lake? A. Yes, sir, within ten feet.

Q. This wind you say was a northwest wind? A. Yes, sir.

Q. Blowing hard? A. Blowing hard.

Q. What was it as to weather, cold or not? A. It was cold, sharp and freezing. Mr. Rocco buttoned up his coat, arranged his clothing and started the speeder ahead in the wind. I had a pail of water with some specimens in it and I also started along at
185 a fairly good rate of speed to get my specimens in the crate and get out of the weather. Mr. Rocco of course gained slowly on my going against the wind and when I got at this signal post or highway limit 35 that is about 15 feet from the entrance to my yard and bridge. Mr. Rocco was still in front of my property, that is hadn't got by my line fence. I had seen him just as he got to this curve and next they was like that (indicating) crash, crash and I knew Mr. Rocco had been hit. I was about 200 or 175 or 200 feet I judge from this footbridge when he was hit. The car was demolished, striking in my yard,
186 one wheel left the car, passed me and went about 200 feet south; near that pumphouse was where the wheel was found.

Q. That is one of the iron wheels of the pushcar came past you? A. Yes, sir.

Q. Where were you then in relation to the track? A. I stepped off from the track, dropped my pail as

the train went by and ran to the accident.

187 Q. How far were you from the point where he was hit? A. About 200 feet as near as I can say; I never measured it. Of course the train went on. I ran down there and saw what had happened.

Q. The train went on past you, did it? A. Yes, sir.

Q. Do you know where the train came to a stop? A. I did.

Q. Where was it? A. At the railroad bridge that I described of this creek going back of Stewart Park about 300 feet south of the Rappuzzi hotel.

188 Q. Could you tell whether or not the brakes were on as it was going by you? A. I don't think they were. I couldn't swear.

Q. You couldn't swear to that? A. No, nor no one else. The car was being ground up under the brakes.

Q. That is the pushcar? A. Yes, sir.

Q. What became of the pushcar? A. It was scattered in sections. The box portion of it was down in the yard by the creek that runs on the east side of the track.

189 Q. Tell us what, if anything, you observed about whistle signals if any occurred on that train. A. At that time, at that certain time that this happened?

Q. Not what they do other times but this time, Fred? A. I don't think so; I can't recall of any whistle blowing at that time because the first thing I heard——

By Mr. Cobb: Object to that last.

Q. What was the first thing you saw? A. The

first thing I saw was the train coming around this
190 curve and saw Mr. Rocco in a crash at the same time.

Q. You saw that when they came together, when the train came into contact with the speeder, your judgment is that the speeder was how many feet away from you to the north? A. I should say around 200 feet. You see my lot is 160——

By Mr Cobb: Object to his reasoning it out.

Q. You say you didn't measure it then and there? A. No, I haven't done no measuring.

Q. Where were you looking when this happened? A. I was looking pretty straight ahead, naturally would be.

191 Q. What do you mean by ahead? A. Anyone walking to the north would naturally look to the north.

Q. Not what you would naturally do, what were you doing this time? A. Looking right straight north.

Q. And Rocco was ahead of you? A. Yes, sir.

Q. Did you see the train come around this bend? A. I did.

Q. When you saw this train did you see it before it hit Rocco? A. The time would be so short. Yes, sir, it was like that clap, clap, one was the train and
192 one Rocco at the same time, small difference.

Q. At that time you were standing back here by this iron standard with the sign that has the figures 35 on it? A. 35, yes, sir.

Q. Now, did you indicate to Mr. Crandall where you saw this collision, did you this spring indicate to the surveyor where you saw this? A. Yes, sir, it

was marked on the track exactly; it is there today.

Q. You did indicate that to him? A. Yes, sir. 193

Q. Now, how is your hearing, Fred? A. I don't think it can be beat.

Q. You are outdoors most of the time? A. All the while, every day that is possible.

Q. And the direction of the wind was towards you? A. Yes, sir.

Q. And from the time that Rocco left you and proceeded north at the point there by the hotel you were also proceeding north, were you not? A. Yes, sir.

Q. Have you been in that locality, that is in the locality of that crossing, car crossing and in the locality of your bridge, the entrance to your place there when you have heard signals, whistle signals? A. Several times. 194

Q. In other words if signals were given was there anything to prevent you from hearing it that day?

By Mr. Cobb: Objected to as incompetent, improper.

By the Court: He may state whether he knows anything to prevent it.

Q. Do you know of anything to prevent you hearing signals if given or not? A. There certainly couldn't have been. 195

Q. On other days did you hear signals about the place where the train enters on this?

By Mr. Cobb: Objected to.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

Q. You may state whether you heard signals
196 about the same place on other days? A. Yes, sir, I have heard signals, whistles there at different times.

Q. At this same point? A. Yes, sir.

Q. You say you stepped off the track? A. Yes, sir.

Q. When did you step off the track? A. The minute that the collision occurred, in fact he was on the track and between the rails, I was on the side of the track.

Q. And you had this pail of specimens in your hand? A. Yes, sir.

Q. And as I get it you dropped that down the
197 side, down the bank? A. Yes, sir.

Q. And when the train went by you ran up to where Mr. Rocco was? A. Yes, sir.

Q. Where was he when you got up there, I mean in relation to the rails? A. Right between the rails to the center of the track.

Q. His limbs were severed and his head and he was between the rails? A. Yes, sir.

It is conceded by the parties that the accident caused the death of the decedent.

Q. Can you tell about where he lay in relation to any point along the track? A. I don't quite under-
198 stand you.

Q. You were looking right at it when it happened? A. Yes, sir.

Q. What happened to him and you have told what happened to the track, what happened, did the train push the handcar for a ways or smash it up? A. Smashed it up. I think perhaps the body could have

gone 25 or 30 feet from where it was hit, it was scattered. 199

Q. You have observed as you walk along this track from the south and approach this curve what view you get of the track? A. Yes, sir.

Q. Tell the jury. A. From the entrance to the park, what is called the road, the main road to the park, you can look north and see the Remington Salt Company.

Q. That is you look across the corner of the lake? A. Across the water. That would leave these cottages and boats down where you are looking.

Q. You mean by that you can look down across the water to the plant? A. Yes, but you can't see much of the track this way from the Salt Block. I wouldn't think you could see over 200 feet of it from the Salt Block this way. As you go further north that portion is entirely shut off. What is left to see is just cottages and boathouses. 200

Q. Can you see around the curve, see the track around the curve? A. Oh, no.

Q. That is entirely obscure? A. Entirely, oh, yes.

Q. What if anything did you notice about the speed of the train, can you describe it at the time of the accident and as it went by you? 201

By Mr. Cobb: Objected to as incompetent, witness not qualified.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

Q. I am not asking you miles per hour; can you describe the speed of that train? A. Why, yes.

By Mr. Cobb: Objected to.

202 By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

A. This train was three hours and a half late.

By Mr. Cobb: Object to that and move that it be stricken out.

Q. Just describe the speed of that train as you saw it there. A. It came around the bend. It looked to me as though it was doing all it possibly could.

By Mr. Cobb: Object to that and move to strike that out.

203 A. It was doing 30 miles an hour.

By Mr. Heath: We consent that it goes out.

Q. It went by you? A. It certainly did.

Q. Do you drive an automobile? A. I have but lately I have had a driver.

Q. Do you have a motorboat? A. I have two of them.

Q. And have you driven the motorboat and driven between points knowing the distance between and observing the speed as you passed along? A. Yes, sir.

Q. Are you able to judge with reasonable certainty an object passing you such as a train and determining their speed? A. Yes, sir. I have one boat that makes seventeen miles an hour and I run it against the train many times.

Q. You have compared it with trains? A. Yes, sir. My business calls me to cover about six miles of the shore daily.

Q. You have driven your motorboat against the speed of the train? A. Yes, sir. 205

Q. And knowing the speed of the train and the speed of the boat? A. Yes, sir.

Q. Can you state with reasonable certainty the speed of the train as it passed you? A. Yes, sir, I can from my own information.

Q. Based on your experience as we have outlined? A. Yes, sir.

Q. Now I will ask you what was the speed when it passed you?

By Mr. Cobb: Objected to as incompetent, improper, witness not qualified.

By the Court: Objection overruled. 206

By Mr. Cobb: Exception taken for the defendant.

A. About thirty-five miles an hour.

Q. Now I haven't asked you that, Fred. You know the time that train was due in to Ithaca? A. Yes, sir.

Q. Do you know whether or not it was late this day? A. It was, three hours and a half late.

Q. You have observed, have you, Mr. Rocco going out on his track there many times? A. Practically every day.

Q. Immediately after the accident and after you had gone up the track to the place where the body was, parts of it, what did you do then, after that? A. 207 I ran to my house and instructed my wife to notify the sheriff.

Q. And then what did you do? A. Called my hired man and ran back to the place of the accident.

Q. Did there come a time when you went down

north at the instruction of some train crew of the defendant to flag the pick-up? A. There was. I was requested to flag the freight that was approaching.

Q. What freight was that? A. That was a freight pick-up that generally runs—it is due in there from three to four o'clock.

Q. Comes from where? A. Auburn.

Q. That is the local freight? A. Yes, sir.

Q. Did you flag that train? A. I did.

Q. Where did you flag it? A. At the curve.

Q. As it was approaching the south? A. As it was approaching south.

Q. And where was the train when you went out to flag it, do you know? A. It wasn't in sight but it was coming. I couldn't see it but it was coming the other side of the stone boathouse.

Q. The other side of the curve? A. Yes, sir.

Q. And you stopped the freight? A. Yes, sir, I got as far as I could when the train approached.

Q. What, if anything, did you observe Mr. Rocco do from the time he left you to the time this speeder, pushcar, was hit? A. He pumped the car, that is drove right straight ahead towards the wind, which was slow progress.

Q. And where was he in relation to the car when the car was hit? A. He was on his car. At the same time the train came around the curve he was on his car and they both came together.

Q. He hadn't gotten off the car? A. That is impossible; he had no chance.

Q. You were watching? A. Yes, sir, he was

looking straight ahead and I could see.

211 Q. He didn't get off the speeder? A. No, that is impossible.

Q. Have you given us all that you recall about the thing, Fred, about the signals, if anything there was about that? A. This train crew on the freight—

Q. No, not what they said. A. That is all.

Cross-examination by Mr. Cobb:

Q. Fred, you say it was a pretty cold day? A. Yes, sir.

Q. And what did you have on, the clothing? A. I had on a chamois skin jacket, rubber boots and my cap, no mittens.

212 Q. No mittens? A. I never wear them.

Q. You don't have them on the coldest day? A. Oh, no.

Q. What kind of a cap? A. I use a toboggan cap, just an ordinary toboggan cap.

Q. Where do you wear it? A. On my head.

Q. Do you have it pulled down over your ears? A. No, sir, I don't cover my ears.

Q. You didn't have it pulled down over your ears? A. No, sir.

Q. When you first saw Rocco he didn't have his coat buttoned up? A. He did not.

213 Q. What kind of a coat was it, tell the jury? A. It was a sheep-lined canvas coat with a sheep-lined collar or corduroy collar, I couldn't say. I know it was sheep-lined coat with another goods or canvas on the outside.

Q. You were up at the bridge when he came along? A. Yes, sir, I just left the bridge.

Q. Had you seen him coming? A. No, because I
214 just came from under the bridge at this creek.

Q. You had gotten up on the track and was walking towards your home? A. Yes, sir.

Q. How did you come to see him? A. He ran right along by the side of me within three feet.

Q. Did you hear him before that? A. Oh, yes.

Q. How far back had you heard him? A. You could hear the car seventy-five feet.

Q. Make quite a lot of noise? A. Yes, sir, it was an old car, you could hear it coming.

Q. You could hear it at least sventy-five feet? A. Yes, sir.

215 Q. And I suppose you looked around when you saw it coming? A. Not necessarily.

Q. Did you? A. I did not.

Q. You didn't look around until he got right by the side of you? A. I did not.

Q. As he proceeded did you go along by the side of him? A. I did.

Q. Talk to him? A. Just passed the time of day.

Q. Did you run along or walk? A. Just moved along, trotted along. It wasn't a run and it wasn't a walk.

Q. What did you do that for? A. I was in a
216 hurry to get home; I had valuable specimens.

Q. Had you been running? A. I just started to come out from under the bridge.

Q. Didn't you run along? A. No.

Q. Talk? A. Just passed the time of day.

Q. Did he say anything to you? A. Yes, sir, good morning.

Q. He went along to what point before he stopped and buttoned up his coat? A. At the entrance to the park, not the road entrance but the street car. 217

Q. Where the street car extended would come to the track? A. Where the street car stopped.

Q. Do you know why he stopped there and buttoned up his coat? A. Yes, sir.

Q. Why? A. To face the northwest wind on the lake.

Q. When you were along there afterwards did you experience severe cold against your face, hard wind? A. I knew it was cold, of course, but it didn't affect me much.

Q. You did realize that it was strong after you got past the hotel? A. Yes, sir, you could feel more wind. 218

Q. He went along ahead of you? A. Yes, sir, a few feet.

Q. Not going very fast? A. You couldn't go fast against that wind with that car.

Q. He had to work some to pump it along? A. He sure did.

Q. It still made some noise? A. Yes, sir.

Q. I think you told Mr. Douglass what you knew about it on the 10th day of December? A. He was down there and bothered me. 219

Q. Did you tell him the 10th day of December? A. Tell him what?

Q. How this accident happened? A. Told what I knew about it.

Q. Did you tell him about this accident? A. Yes, sir.

220 Q. You say that he had gotten to a point about 200 feet ahead of you when this accident happened? A. Yes, sir.

Q. That is what you say? A. Yes, sir.

Q. What are you fixing that on your judgment now or then? A. Basis of the lot is 163 feet, where it occurred was the north boundary and the signal post which would be a difference of 65 feet.

Q. So you are fixing it by the width of your lot, not memory? A. It is fixed there on the tie.

Q. You told him the truth about the distance? A. Yes, sir.

221 Q. Didn't you tell him he was about 75 or 100 feet ahead of you? A. I don't remember telling him anything about that.

Q. If you did tell him it was 75 or 100 feet, that is about what it was? A. I said it was about 200 feet.

Q. I didn't ask you that. If you did tell him it was 75 or 100 feet, you told him about what was right? A. No, I wouldn't, because it was about 200 feet.

Q. Two days after the accident there wasn't any reason why you should change the distance from then to now? A. At that time I was very busy in

222 my work, rushed with orders, and I wanted to get rid of this order. It was no benefit to me to tell him and I was under no obligations to him.

Q. What you did you were under no obligations to tell the truth? A. Not necessarily.

Q. You told him any old thing? A. That is a business proposition.

Q. Is it now? A. I am speaking the truth.

223 Q. Your story is more accurate now than what you told him the day you told him? A. Yes, sir.

Q. You simply told him this to get rid of him? A. Yes, sir, I didn't want to be bothered, I was busy.

Q. You wouldn't swear that you didn't tell him he was 75 or 100 feet ahead of you? A. No, sir.

Q. You would swear that wasn't about it? A. Sure.

Q. Although you might have told him that? A. I might have told him that.

Q. Would you swear that you were trying to deceive him? A. Not trying to deceive anybody.

224 Q. If you weren't telling the truth what do you call it? A. I was under no obligations.

Q. You were working for Rocco? A. No, sir.

Q. What was your interest? A. My interest was not in visiting or contending with agents.

Q. That is true today, isn't it? A. Yes, sir.

Q. Is that your picture there? A. I think it is, it has got my mackinaw on anyway, yes, sir.

Q. Did you show him about where the accident happened? A. He could see himself, the marks were there on the ties.

225 Q. What were you out there for? A. I use that track considerably. I think that day I might have been going from my boathouse which lies there (indicating), the stone boathouse.

Q. There wasn't any reason why you shouldn't show him? A. No, I have showed 100 people that came along there.

Q. That is you (indicating picture)? A. Yes, sir.

Q. You showed the photographer, I assume, about where the accident happened? A. I think the claim agent showed the photographer where this accident happened.

226

Q. What were you doing there? A. As I said I might have been going from my boathouse.

Q. Didn't you show the photographer where this accident happened? A. I showed this claim agent.

Q. Didn't you show this photographer? A. That was Sheldon, I believe, I know they had considerable time getting this camera fixed.

Q. You know Sheldon? A. I don't think so.

Q. You have seen him before? A. So many people I see.

227

Q. You know he is a photographer here in Ithaca? A. Yes, sir, but I wouldn't know the man.

Q. You don't mean to say the claim agent of the Lehigh Valley came there to take pictures? A. Is Sheldon a Lehigh Valley man?

Q. No, you don't mean to say the claim agent brought Sheldon there to take pictures? A. Yes, sir. He was to my house three or four times and had this photographer with him according to my wife's story and I was requested to stand in this one position while they focused.

228

Q. What did they ask you to do? A. Stand in the middle of the track where the accident occurred.

Q. That is what you did? A. Yes, sir.

Q. No harm in that? A. This is a fairly good picture.

Q. That is a fairly good picture of the conditions

there on the day of the accident, No. 1 and 2? A. No, sir, I don't think so.

229

Q. What is the matter? A. This picture (No. 1) was taken at a point where you can see the Salt Block and track north of my boathouse. No. 2 this shows just the curve where the accident happened. The cameraman stood on the west side of the track when he took this picture.

Q. Does it show the Salt Block? A. Naturally.

Q. Shows some of the lake and railroad track beyond the boathouse? A. Yes, sir, it does down there, but I say he stood over here in Stewart Park to take this picture.

Q. Did he? A. He certainly did.

230

Q. How far is that camera away from where you stood? A. Right here (indicating) is the corner of the lake and he stood right here (indicating) because he has this building here (indicating) which he couldn't have got.

Q. You stood there by the accident? A. Yes, sir.

Q. You say he stood in Stewart Park? A. That is true.

Q. How much of the track can you see south of you? A. I can stand there and see the track clear to the hotel site.

231

Q. In this picture, how far does it show the track? A. I should say it showed about ten feet.

Q. You would want to say the camera was back to the highway? A. No, but it was west of the track because it shows your buildings here.

Q. You are standing about where the accident

happened? A. Yes, sir, just about.

232 Q. How far is that from the highway that goes into Stewart Park? A. 663 feet. The reason I know there is a hydrant at the entrance to this park and I get my insurance cheaper by being within 300 feet of this hydrant. Where I stand here (indicating) is practically my north line, 165 feet.

Q. That is how far? A. 600 feet and something from the highway.

Q. You can see ten feet of the track? A. Yes, sir.

Q. The camera couldn't have been much farther? A. Yes, sir, 50 feet.

233 Q. As much as that? A. Yes, sir.

Q. If it was 50 feet and showed 10 feet, it must have been 60 feet from you? A. Yes, sir.

Q. So it must have been 540 some feet from the highway? A. Yes, sir.

Q. So that wasn't in Stewart Park? A. Yes, sir, it would have to be about 30 feet up in Stewart Park.

Q. You see that map there? A. Yes, sir.

Q. Have you looked at it before? A. I just glanced at it the other day.

Q. The sign marked 35 is how far north of Stew-
234 art Park highway? A. That would be about 340 or 350 feet.

Q. Looking right straight along there to where your line comes over to this railroad track how much of that railroad track could you see south of where Rocco was? A. There can't be one inch of track seen.

Q. As you stand there and along that red line, continue it where it strikes this track how much could you see of that track to the Salt Block? A. You could see every inch to the Salt Block. 235

Q. You say it wouldn't be over 200 feet? A. You are down here (indicating), that is a straight line of track up here is where you didn't see over 200 feet (indicating).

Q. Where? A. Where the accident occurred. Here is the boathouse and here is where I say you can't see over 200 feet, where the accident occurred to the curve here.

Q. You mean you couldn't see over 200 feet from where Rocco was? A. Where he was hit. 236

Q. As you were on this railroad track, if you had looked along the red line on this map, Exhibit B, how much of that railroad track could you have seen from that point to the Salt Block? A. That depends where I stood.

Q. Right here at this sign 35? A. You can't see an inch of it.

Q. You can't see an inch of that track? A. No, sir.

Q. You heard Crandall say you could see 600 feet? A. No, he didn't. Mr. Crandall told you that at the entrance of the park here there was a straight run down to this corner (indicating). 237

Q. This is a red line here? A. Yes, sir.

Q. Extending that would come to 35 on the track? A. Yes, sir.

Q. There isn't a thing as you look north past the boathouse to interfere with your view? A. Yes, sir.

Q. What? A. Here I have a boathouse and here

is the lake. You can get down as far as this signal,
238 which is 300 feet from the highway.

Q. Here is a line drawn straight, what is in the way of that line, nothing out here? A. Nothing but water, but it would strike at the whistle signal.

Q. How far from that whistle signal back to the salt plant? A. I should say that would be 700 feet.

Q. Then you could see about 700 feet of that track? A. Where?

Q. From 35. A. You could see the first telegraph post about 100 feet.

Q. This line extended goes out by this? A. Whistle.

239 Q. We will extend this anyway. That extended goes out right here, don't it? A. About 100 feet north of the boathouse.

Q. How much track do you see from that point to the Salt Block? A. From there?

Q. By this sign 35? A. You can't see an inch.

Q. You can see that way? A. You probably could see just the corner of the Salt Block, there is a boat here.

Q. That boat don't interfere? A. I should say it does.

Q. You will admit that this red line goes to the
240 west of any obstruction of that right of way? A. Yes, sir.

Q. As you look along there what is to interfere with your seeing the railroad? A. Where are you looking from?

Q. Thirty-five. A. Crandall told you you could see 300 feet.

Q. You could? A. Yes, sir.

Q. From this clear to the Salt Block? A. No, about half way. 241

Q. Could you see the rest? A. How can I duck around this boathouse?

Q. Your line is here (indicating)? A. It strikes west.

Q. If you look west, why can't you see to the Salt Block? A. Beyond 35? You can't go north of 35 and see it.

Q. I was at point 35? A. You can see the biggest part of the track.

Q. As you come back this way further you can see more? A. No, you couldn't see any more than the Salt Block. 242

Q. As you come back to the east you could? A. From the highway?

Q. No, along the track, suppose you are half way back to the highway and look across? A. You could see the Salt Block.

Q. You could see more? A. You couldn't here (indicating) but you could down there (indicating) because these buildings are going to block it.

Q. I ask you to look that way, half way from thirty-five, to the highway, right there in the railroad track when you put that line across without any obstructions you can see more from that point than you could before? A. Not much, a little bit. From that road that enters the park you can see clear to the Salt Block, but after leaving Signal Post 35 going north you don't see any further. 243

Q. Do you say when Mr. Crandall said he could

see 600 feet of the track that you couldn't see from
244 that point to the Salt Block? A. He didn't say that. You didn't understand. 600 feet from the road entering Stewart Park back down this way.

Q. Now I am asking you at point 35, looking west of any obstruction where that red line is on the map B, extending that to where it strikes the railroad track, how far from that point to the Salt Block? A. I should say that was around 600 feet. Of course I never measured it, it is just what I judge it. You can't see beyond the block.

Q. 60 feet is an inch? A. Yes, sir.

Q. 60 times 15? A. That is about 900 feet.

245 Q. Would you say that you could see 900 feet of this track from that point? A. Yes, sir, I would say that you couldn't see it.

Q. This is 35? A. Yes, sir.

Q. That is the red mark and follow that right out to where that hits the railroad track? A. Yes, sir.

Q. What is there to interfere with your view looking west? A. Looking west?

Q. Looking right along it? A. You measured from here, down there (indicating).

Q. I am. I measured from where that line hits it. You see me? A. Yes, sir.

246 Q. If it is 15 inches, that is 900 feet? A. Yes, sir.

Q. Why can't you see 900 feet? A. I assumed 600 feet. That isn't what Crandall said. You asked him how far you could see from the entrance to the park to the scene of the accident.

Q. You could see farther than that as you came

back towards the highway? A. Yes, sir.

247 Q. You say that you ran along after that speeder? A. I didn't say I ran; I said I jogged.

Q. What is the difference? A. A lot. A jog is little better than a walk.

Q. You weren't looking for a train coming from the north? A. I always look for trains. I spend a lot of time on the tracks.

Q. Did you look from the point where this highway crosses into Stewart Park along west of this obstruction to see whether you could see a train coming south of the Salt Block? A. I could see the Salt Block as I came along. I was looking straight ahead, 248 I naturally would be.

Q. Did you look to see a train? A. No, I didn't look for trains. I looked straight ahead.

Q. If you had looked from near 35, you could have seen a train for 900 feet if it had been there? A. No, sir, I wouldn't say that.

Q. You didn't look? A. Oh, yes, I was looking all the while. I was looking right straight ahead.

Q. Why do you mean you didn't see it? A. I wasn't looking for trains.

Q. Were you looking for trains? A. I don't never look for trains, I look straight ahead.

249 Q. You didn't that day? A. No, I never did.

Q. Yet you are always looking for them? A. I didn't, I look straight ahead.

Q. As you were running along on the ties? A. No I wasn't.

Q. You were by the rails? A. On a well beaten path.

Q. Did you look down as you ran? A. I was
250 trotting.

Q. Did you look down? A. No, I looked straight ahead.

Q. Did you look up? A. No, straight ahead.

Q. Were you looking at Rocco? A. No.

Q. Did you see Rocco? A. I could see him. I would naturally unless I looked up in the highway or down on the ground.

Q. You weren't looking for trains? A. Oh, no.

Q. Did you see when this train got to the whistling post you know where the whistling post is on this map. You say that that engineer didn't blow
251 the whistle? A. It hasn't been blown at that point for six months; it isn't blown there yet.

Q. This day in question you will swear it didn't blow? A. Yes, sir, because that whistle can be heard for a radius of ten miles on the lake.

By Mr. Cobb: I move that last be stricken out.

By the Court: Motion granted.

Q. You will swear that he didn't blow this whistle? A. I didn't hear it.

Q. How can you swear? A. How could I?

Q. I understood you to say you didn't hear any whistle that day? A. No, sir.

252 Q. You don't want to swear he didn't blow it? A. No, I can't swear to it any more than you can.

Q. Did you tell the counsel that this train was going 35 miles an hour when it passed you? A. My best judgment.

Q. Didn't you tell him that it was going thirty

miles when it was coming around the curve? A. I did not.

253

Q. You said it was doing its best, 30 miles an hour? A. I just said 30 to 35 was my best judgment.

Q. Which do you want it, thirty or thirty-five? A. I can't remember exactly at that certain location, but the train used to leave Ithaca at 4:57 and it was 20 minutes past four when the accident occurred.

Q. You are giving your best judgment what occurred after the accident, how fast this train was going? A. Yes, sir.

Q. Do you say it was going thirty to thirty-five miles as it came around the curve? A. Between thirty and thirty-five.

254

Q. When it went by you it was going 35? A. It was practically the same point within 200 feet.

Q. You don't know whether they put the brakes on or not? A. That is impossible to tell, there was too much noise.

Q. You saw Rocco stop and button up his coat? A. Yes, sir.

Q. Did the speeder stop? A. Oh, yes.

Q. Did you tell Mr. Douglas that you heard the train whistle and looked up? A. I did not.

255

Q. I am going to read you now—you did make this statement and sign it? A. I didn't read the statement, he had a chance to put in anything he wanted to.

Q. Is that your signature? A. Yes, sir.

Q. You remember telling him about it and about signing it? A. I remember telling him, yes.

256 Q. You told him the things you knew at that time? A. I told him just about the way things happened.

Q. If you told him you were 75 to 100 feet from the speeder when it happened that was about the way it was? A. I was under no obligations.

Q. You think when you told him that you don't think you told the truth? A. Not after looking over the situation.

Q. You think you were 200 feet instead of 75 feet? A. I know I was 200 feet, not 75 feet.

Q. You didn't care what you did tell him then? A. Oh, no, I was very busy.

267 Q. But you are willing to swear "I heard the train whistle, I looked up and saw the train and speeder on the track and then the motor car struck the speeder." Did you say that? A. I do recall I can safely say that the train whistled at the same time it came around the curve within a question of ten seconds.

Q. You do recall that you heard the train whistle? A. I don't know as I really could swear to it because the train does blow at this curve.

Q. If you told it to him on the 10th of December, it must have been right? A. I don't know whether I told him or not.

268 Q. What do you say now, did you hear it whistle or didn't you? A. I won't swear to it.

Q. You won't swear that you told him or didn't? A. I don't know anything what I told him. It was very immaterial to me.

Redirect examination by Mr. Heath:

2199

Q. This is no fooling matter between you and Mr. Cobb, you and me, you and the Court, or you and the jury. We want to know, everyone wants to know what you heard and what you saw. Now, I ask you, under oath, your oath as you sit there, whether you heard this whistle back of the curve or not? A. I didn't hear any whistle back of the curve.

Q. Now I ask you if whether just prior to the impact you heard a whistle? A. No, I won't swear that I did.

Q. May you have heard a whistle just prior to the impact? A. I might but I won't swear that I did.

2200

Q. What is your best recollection, your honest recollection about it? A. I don't think to my best recollection that the whistle blew at that time.

Q. You were going along behind Rocco and he was proceeding north? A. Yes, sir.

Q. And he was some little distance ahead of you? A. Yes, sir.

Q. And you were expecting when you got to this bridge that goes across into your premises to go across there? A. Yes, sir.

Q. But you hadn't got to that point yet? A. No, sir.

2201

Q. You say you were looking north? A. I were.

Q. There came a time when you saw the train? A. Yes, sir.

Q. And where was Rocco's speeder when you first saw the speeder? A. Oh, I should say from 150 feet from the train because this train could not be seen until it rounded that boathouse at the curve.

Q. When you are talking about the boathouse you
262 mean the boathouse on the point. Whose is that?
A. Ed Sprigg.

Q. You did see the train then? A. I did.

Q. You think it was 150 feet from the speeder?
A. Yes, sir, not over 200 feet.

Q. Can you tell us how much lapse of time—you weren't looking for an accident? A. I weren't.

Q. You are giving your best judgment how it happened? A. Yes, sir.

Q. Can you tell us the point of time, how much time elapsed from the time you saw the train until it came in contact with the speeder? A. Fifteen sec-
263 onds.

Q. Fifteen feet a second? A. 150 feet.

Q. That is your judgment? A. Yes, sir.

Q. When you saw the train you knew there was a train and there was the speeder and it is hard to tell; you are giving your judgment. A. The contact came very quickly.

Q. Did you see this thing go by your head? A. Oh, no.

Q. How close did the wheel come to you? A. It passed between the train and where I stood. I stood, I should think, fifteen or twenty feet from the track.

264 Q. You think it was the wheel? A. I know it was the wheel.

Q. Did you see it afterwards? A. Yes, sir.

Q. How close to you? A. There was a sizzling noise and a wheel passed within a radius of twenty feet and carried about two hundred feet from where I stood.

Q. You saw the wheel afterwards? A. Yes, sir.

Q. Which side of the track? A. East side of the track by the pumphouse. 265

Q. You were on the east side? A. Yes, sir.

Q. The wheel was picked up by the pumphouse? A. Yes, sir.

Q. On the east side of the right of way? A. Yes, sir.

Q. The old Stewart Park didn't go over to the lake road ten years ago? A. The street car company has a right of way.

Q. Do you know what I mean by the lake road? A. No, sir.

Q. They have bought a lot since Ed Stewart's death and go on over to the lake road? A. They did. 266

Q. So the Stewart Park property does extend east of the right of way to the lake road? A. Yes, sir.

Q. South of your property? A. Yes, sir, eight feet exactly.

Q. That is what you mean when you were talking to Mr. Cobb? A. Yes, sir.

Q. The land does go over there? A. Yes, sir, within eight feet of my line.

Q. You told counsel that you didn't hear the whistle but you wouldn't swear that it didn't blow. What do you mean by that? A. I'll tell it in my own way. 267 A man hasn't much to think of when he sees two objects coming together.

Q. Prior to the time the gasolene car came around the bend, you didn't hear a whistle? A. I did not.

Q. Were you in position to hear? A. I was.

Q. Now you told counsel that the man didn't blow
268 the whistle, what do you mean? A. I could have heard the whistle if it had been blowed for ten miles.

Q. You didn't see the engineer back of the curve? A. No, sir.

Q. So you didn't see whether his hand moved up to the whistle? A. No, sir, that is the point.

Q. But you didn't hear it? A. No, sir.

Q. Have you observed the gasolene car as it runs along the track? A. Yes, sir.

Q. Tell us what you observed when the gasolene car moves along, whether it makes much noise? A. That depends on the condition of the car. The car
269 has to be overhauled about once a week or two weeks.

Q. Compared to a steam engine? A. A good deal stiller.

Q. More like an automobile? A. Yes, sir.

Q. This train that hit Rocco was a gasolene car? A. Yes, sir, although the whistle is more intense, can be heard for miles.

Q. You told counsel about hearing it—have you been out on the lake and heard them? A. Yes, sir, both sides of the lake.

Q. Before this accident had you observed what trains do at that point, you have observed since?

270 By Mr. Cobb: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

A. Yes, sir.

Fred Stevens, for plaintiff, recross
Motion for non-suit and dismissal of case

Recross examination by Mr. Cobb:

271

Q. You say you trotted along after this speeder? A. Yes, sir.

Q. After it left the highway crossing? A. Yes, sir.

Q. How fast was it going? A. A little faster than a walk.

Q. How many miles an hour? A. Four miles an hour.

Q. Five at the outside? A. Yes, sir.

Q. You say this car had a pretty sharp whistle on it? A. Yes, sir.

272

Q. More than a locomotive? A. Yes, sir.

Q. You didn't look up to see whether a train was coming until the accident happened? A. I never looked up or down, just straight ahead.

Q. You didn't have your mind on this train? A. No.

Q. Yet you want to say that he didn't blow this whistle back there before he got to the curve and do say it? A. There was no whistle sounded the other side of the curve.

Q. Do you want to change your testimony that you wouldn't swear they didn't blow it? A. I wouldn't swear to it. I don't believe in swearing to anything I didn't see.

273

Plaintiff rests.

By Mr. Cobb: At the close of plaintiff's case, defendant moves for a non-suit and dismissal of plaintiff's case on the following grounds:

First. Plaintiff has failed to prove facts sufficient
274 to constitute a cause of action.

Second. That the plaintiff has failed to prove any negligence on the part of this engineer operating this train or any other employee or on the part of the defendant itself causing this accident.

Third. That from the physical facts and the testimony introduced it appears as a matter of law that this decedent knew as much about the conditions as anybody and he knew that trains ran at any time and he knew that he was bound to keep out of the way of trains on that track and if he failed to do it, which he did in this case, he assumed that risk on entering
275 and continuing that employment as a matter of law, and further that he was guilty of contributory negligence as it stands as a matter of law.

By the Court: Motion denied.

By Mr. Cobb: Exception taken for the defendant.

J. ERNEST PIERCE, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

276 *Examined* by Mr. Cobb:

Q. Mr. Pierce, where do you live? A. Cortland.

Q. What is your business? A. Supervisor of track of the Lehigh Valley.

Q. On December 8, 1927, what was your business? A. Supervisor of track of the Lehigh Valley.

Q. Now what territory did you have that time, December 8, 1927? A. I had the road from Ithaca to Auburn up the lake and Elmira and Cortland branch, East Ithaca to Elmira and Seneca Falls branch. 277

Q. And did you live here in Ithaca at that time? A. Yes, sir.

Q. And now you reside where? A. Cortland.

Q. Now do you have charge of the Auburn branch? A. The Auburn and Ithaca branch?

Q. Yes. A. No, sir.

Q. But at that time you did? A. Yes, sir.

Q. With respect to the track men and the track walkers, foremen of the gangs, what was your duty? 278

By Mr. Heath: Object to that as the rules are the best evidence. Testimony is characterized.

By the Court: He may tell what duties he discharged. Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. I had charge of the track maintenance; I had charge of the section gangs and track walkers and others that came under that line.

Q. And was that continuing past the 8th day of December, 1927? A. Yes, sir.

Q. Who was the foreman of the section leading from Ithaca to the salt mine? A. Thomas McCarthy. 279

Q. At that time? A. Yes, sir.

Q. Where is he now? A. Dead.

Q. When did he die? A. He died around the first of March last year.

Q. 1928? A. Yes, sir.

Q. Did he continue as foreman of the track gang

up to that time? A. Yes, sir.

280 Q. He had been for a number of years? A. Yes, sir.

Q. Do you know about the time that Rocco started to run the handcar and inspect the track from Ithaca to the salt mine? A. He had been on the job about a year and four months.

Q. Had you known him personally? A. Yes, sir.

Q. Had you seen him and talked to him? A. Yes, sir.

Q. How long before the accident on the 8th day of December had you seen him and talked with him? A. I had seen him within a month, within two weeks.

281 Q. At that time did you give him any instructions? A. Yes, sir.

Q. What did you tell him? A. I told him to find out from the operator the location of all trains before he put his speeder on the track to go over the line.

Q. Was that a rule that had been given you by your superior?

By Mr. Heath: Objected to, the rule is the best evidence.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir.

282 Q. And from whom did you get that instruction? A. From the division engineer.

Q. Who was he? A. Mr. Cullen.

Q. From where? A. Auburn.

Q. Was he the division engineer on the 8th of December and before? A. No, he wasn't there then; he had been transferred.

Q. When was he transferred? A. Possibly a year before that; I couldn't say just when. 283

Q. That instruction that you got from him was it still in force or had it been revoked? A. It was still in force.

Q. Did you instruct others along the Auburn branch as to that?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir.

Q. Who else? A. Inspectors and foremen Ludlowville, Kings Ferry and Aurora. 284

Q. Was there any other branch or main line track of the Lehigh Valley that had these handcars that the track walkers used? A. Not that I know of.

Q. Was this section between Ithaca and the salt mine and thence on to Auburn the only section where the men used this kind of handcar or speeder? A. It is the only section that I know of.

Q. These instructions that you gave to Rocco, which you stated was in effect all of the time from the time that you got it from Cullen down to the time of this accident? A. Yes, sir.

Q. And is it still in effect? A. Yes, sir. 285

Q. And does it apply to this branch between here and Ithaca? A. Between here and Auburn.

Q. Between here and Auburn? A. Yes, sir.

Q. There are a great many times when the lake washes over the track and washes it out? A. There is, yes, sir.

Q. A great many times when the bank slides in
286 the spring and even in the fall after heavy rains? A. Liable to have a slide any time.

Q. And trains on this branch are quite apt to run into those things? A. Yes, sir.

Q. This day of the accident where were you? A. I was down between here and Aurora with the work train.

Q. Who was with you? A. I had a section gang at Ithaca, Ludlowville and Kings Ferry.

Q. Were you supervising them that day? A. Yes, sir.

Q. That is part of your duties? A. Yes, sir.

287 Q. Was Gabriel Rocco with you that day? A. He was.

Q. Do you recall when the passenger train went down from Ithaca that morning to Auburn, do you remember the occasion? A. I don't remember when the passenger train went down.

Q. Do you remember where you were when the train passed you when it went to Auburn? A. No, sir, I don't.

Q. Do you remember when it came back? A. No, sir.

Q. But you do know you were down working on
288 the track? A. Yes, sir.

Q. You didn't hear of this accident until long after? A. Six o'clock at night they told me at Aurora about it.

Q. Do you know what Rocco's duties were as track walker? A. Yes, sir.

Q. What was he to do?

By Mr. Heath: Objected to on the ground that the rules published by this defendant, submitted in this trial by its counsel, which are here, are the best evidence as to what Rocco's duties were and what the duties of the people along that line were without characterization. 289

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

Q. Special duties and all? A. Patrol the track ahead of passenger trains, looking for obstructions and wash outs on the track.

Q. But before doing that what was he to do first? A. His first duty was to go to the station and find out through the operator the location of all trains which might interfere with freight and passenger service. 290

Q. Why was that?

By Mr. Heath: Objected to as calling for a conclusion.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. To prevent the men from getting injured who were operating those speeders.

Q. Do you know whether that instruction or rule had been in force prior to the time you went on here as supervisor? A. I couldn't say. 291

Q. How long had you been supervisor here? A. I think it was 1919 when I came on this territory here, either 1918 or 1919. I am not positive which.

Q. Was it in effect then? A. I couldn't say whether it was at that time or not.

Q. Can you tell me when it did commence to be

292 in effect? A. I issued those instructions about two or three years after I took the job here.

Q. Then what year would that be when you gave these men these instructions? A. I should judge 1922.

Q. Would you say that rule was in effect from 1922 on? A. Yes, sir.

Q. Was it in 1923? A. Yes, sir.

Q. 1924? A. Yes, sir.

Q. And had you received those instructions from your division engineer? A. Yes, sir.

Q. And they had never been revoked up to the time of this accident and haven't yet? A. No, sir.

293 Q. Now, who was the operator here at Ithaca at that time? A. John Clapp was the day operator.

Q. His time was from what time in the morning until afternoon? A. 8 o'clock in the morning until four.

Q. And he was operator or dispatcher down at the Lehigh station? A. He was the operator.

Q. At Ithaca? A. Yes, sir.

Q. Mr. Pierce, in your experience, what do you say as to whether or not this track along the lake is the only part of the Lehigh Valley tracks where they are subject to slides and washouts?

294 By Mr. Heath: Objected to as a conclusion.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. No, it is not.

Q. Where else? A. They have slides in the main line between Lysocks and Standing Stone.

Q. On the branch lines in New York State is

there any other track that is subject to the severe conditions of rain and water conditions from the lake that there are along this track? A. No, there are not. 295

Q. Do you know whether or not that is why these men were stationed along these sections to inspect these tracks? A. That is the reason they were put there.

Cross-examination by Mr. Heath:

Q. Now, Ernest, if a train is two hours late getting out of the city of Ithaca, a passenger train, do you want to tell this jury that it wasn't his duty as a track inspector to go out on the road on his usual time? A. No, he is supposed to go out on his usual time. 296

Q. If a passenger train was two hours late at Ithaca and reached the City of Ithaca at 9:40 in the morning, it was his duty to go out on the job at 6:30 just the same? A. Yes, sir.

Q. So when you are saying that it was his duty to protect a certain passenger train, is it your suggestion to make some special rule to govern this case? A. No, I am not.

Q. When you say to me that it was his duty to go out at 6:30 whether the passenger train went or not, you say that is true? A. Yes, sir. 297

Q. That was universally true all the time you were on this section? A. Yes, sir, he went out at 6:30.

Q. His duty was prescribed in the rule book? A. No special track.

Q. Which were precedent in your rules, special

rules or printed? A. Those are general rules governing the operation of the whole system.

298

Q. They govern Wysock where you have washouts too? A. Yes, sir.

Q. If the passenger train didn't go out at all during the whole forenoon he was supposed to attend to what? A. He has to go down and get in ahead of the train, the freight train.

Q. Suppose the freight train didn't come in he was supposed to patrol? A. Yes, sir.

Q. He had regular hours? A. Yes, sir.

Q. 6:30 to 12:00 and 3:30 to 8:00? A. About that.

299

Q. He got his pay $112.00 a month for ten hours? A. Yes, sir, and extra time too.

Q. If he worked extra, he got extra pay but he was supposed to be out on this track between 6:30 and 12:00? A. Yes, sir.

Q. There were freight and pick-up movements over those tracks besides the passenger trains? A. Yes, sir.

Q. You say that you saw Joe Rocco two weeks before he was killed? A. I saw him within two weeks.

Q. Within two weeks and you told him that it

300

was his duty to go in to the train dispatcher and find out the conditions of the trains on the track before he put his speeder on the track? A. Yes, sir.

Q. That you told him two weeks before the accident? A. I wouldn't say two weeks.

Q. Within two weeks, is that right? A. Yes, sir.

Q. Then you went down and told the foreman of

the section in the Kings Ferry District? A. Not at that time. I instructed them all. 301

Q. Then you testify that you did tell that to the section foreman at Kings Ferry? A. Yes, sir.

Q. And the Section Foreman at Ludlowville? A. Yes, sir.

Q. And the Aurora section? A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. But here, Ernest, on Section 25 you told it to the track inspector himself? A. I told it to the foreman, the track walker and the section foreman, all of them.

Q. Did you tell that to the track walker at Kings Ferry? A. Yes, sir. 302

Q. When did you tell them that? A. Within a month or two. When I come along I always talk to the track walkers.

Q. Within a month or two of this accident? A. Yes, sir.

Q. That applied to Kings Ferry, Ludlowville, Aurora and Ithaca? A. Yes, sir.

Q. You made it your rule every time you came along, you told them? A. I instructed them to find out about the trains before they put their speeder on the track.

Q. Every time? A. Not every time I saw them. 303

Q. When did you tell that to the Kings Ferry man? A. I instructed him within three or four days when I was there with the work train.

Q. Where did you see Joseph Rocco when you told him this? A. Over by the tool house.

Q. Who was present? A. No one. I met him

304 there when he was going to start on his trip.

Q. No one else was there but you and he? A. I don't think there was.

Q. Are you saying to this jury that that rule applies only to this section here? A. What rule?

Q. The rule we have just been talking about, about seeing the dispatcher? A. No, I say it applies to all these track walkers not only Ithaca but Aurora, Ludlowville, Kings Ferry.

Q. Does it apply at East Ithaca? A. They don't have them.

Q. Do you have them except on the branch lines? A. Yes, sir, foremen go over with motor cars.

305 Q. Their speeders are gasoline cars? A. Yes, sir.

Q. You don't have a rule with them to go to the dispatcher? A. Yes, sir.

Q. You have a rule on every division of the railroad that that is their duty? A. Yes, sir.

Q. Do you understand? A. Track walkers or foremen?

Q. Has the Lehigh Valley Railroad Company a rule that every foreman of a section gang in charge of track walkers or track inspectors shall find the schedule of the trains over the track each day before putting the speeder on the track? A. Yes, sir.

306

Q. Where is such a rule? A. In a special book covering the operation of motor cars.

Q. This is a general rule book that even covers track walkers, section foremen, signal men, engineers, conductors, firemen and even includes your job as track supervisor? A. Yes, sir.

Q. It isn't in this book? A. Not the rules governing the operation of motor cars. 307

Q. Is there another book? A. There is a pamphlet governing the operation of motor cars.

Q. What do you mean? A. Gasoline operated section cars.

Q. You say that Cullen gave this rule? A. Yes, sir.

Q. And Cullen wasn't in charge, wasn't on this section, wasn't on this division at the time of the accident? A. No, sir.

Q. And he hadn't been for a year, is that correct? A. Correct.

Q. I assume you mean, Ernest, the division of the A. & I. branch? A. Division engineer of the Auburn Division. 308

Q. When he found out, if he found out, it was his duty to go out on the track just the same? A. You mean after he found out about the trains?

Q. Yes, it was his duty to go? A. Yes, sir.

Q. And when there was a washout along this line down here the train has to proceed with caution and get along the best it may, even having to wait for workmen and crew that are fixing the tracks? A. Yes, sir.

Q. When this train started out of Auburn the day of this accident, was it late? A. I only know from the records. 309

Q. Have you seen the records? A. Yes, sir.

Q. Was the train late when it started out? A. Two hours or better late as I remember.

Q. When it started out of Auburn? A. When it

arrived in Ithaca. I have nothing to do with the
310 operation of the train.

"The records show that this passenger train left Auburn at 11:30 and arrived in Ithaca at 4 P. M."

"It was supposed to leave Auburn at 10:35."

Q. So that it was away late leaving Auburn? A. Nearly an hour late.

Q. Is that right? A. Yes, sir.

Q. What time was it due in Ithaca? A. I think it is due here 12:17.

Q. So that the running time of that train from Auburn to Ithaca is what? A. One hour and 52 minutes into State Street.

311 Q. How long did it take to come from Auburn to Ithaca that day? A. Four hours and a half.

Q. So that it is a fact to you as a railroad man, isn't it, Ernest, that that train wasn't running on any kind of a schedule as it came in that day? A. No, sir.

Q. It was going with caution and going the best it could on account of the condition of the track? A. Yes, sir.

Q. No one could have told Rocco where he would meet that train? A. They could have told him where it was when he started.

312 Q. Due to the condition of the tracks as they were where it would be any time? A. No, I don't.

Q. It wasn't running on any schedule or keeping on any schedule time anywhere? A. No, sir.

Q. Now, do you know whether or not this rule that you have told us about of going to the dispatcher and finding out this information of where a train was, was used in the City of Ithaca? A. I checked

up the operators to find out whether they were finding out about the trains. 313

Q. Do you know whether it was being lived up to? A. Yes, sir.

Q. At all times? A. At times when I found it wasn't I went after the men.

Q. At times? A. It was being lived up to to the best of my knowledge.

Q. You had no written record of any violations of this special rule? A. No, I hadn't.

Q. It is the duty of the train dispatcher to file violations of rules? A. The train dispatcher has nothing to do with it. He went to the agent, the agent wasn't the operator. 314

Q. It was his duty to go to the operator? A. Yes, sir.

Q. What is the operator's name? A. John Clapp. Marion Slack in the morning.

Q. Wasn't it the duty of John Clapp to report to you about it? A. Yes, sir, he notified me the men weren't coming over to find out about it.

Q. Joe Rocco was a good employee? A. Yes, sir.

Q. And did his work well? A. Yes, sir.

Q. And faithful? A. Yes, sir.

Q. Is that so? A. Yes, sir.

Redirect examination by Mr. Cobb: 315

Q. You told counsel, regardless of whether any passenger was going out or in, Rocco had to start out at 6:30 and inspect the track? A. Yes, sir.

Q. Did he do that at 6:30 in the morning if the operator told him not to go out? A. The operator

316 wouldn't have any train.

Q. He would have to call up the operator? A. He would have to find out from the operator.

Q. If he found a train against him? A. He would protect himself. He would wait until the train got in and then put his speeder on and go on if the train left Ludlowville a certain time he might have been able to come a mile down the track and set his speeder off.

Q. Before he went out was it his duty to first find out from the operator where the train was? A. It was.

317 Q. If he had called up this operator that afternoon could he have found out where this train was?

By Mr. Heath: Objected to.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. He would. He would have found out the last station it passed.

Q. That day in question had you seen Rocco in the morning? A. No, I don't think I did.

Q. What time did you go down with the work train? A. I think that left here at 7 o'clock. I couldn't swear to it.

318 Q. Counsel asked you about other rules not in that book or whether there was other rules that governed the operating of motor cars. I show you Lehigh Valley sheet dated December 31, 1926, for the operation, care and maintenance of motor cars and I ask you whether or not that same rule that you were working under requiring the track walkers on the Auburn Division is the second paragraph on that as

to the motor cars on other branches? A. It is, yes, sir. 819

Q. Does that provide that they must find out before they put their motor cars on the track from the dispatcher or someone that dispatches the trains, where they are? A. It does.

Q. Now suppose that Rocco was down at Ludlowville and he wanted, before he put his speeder into operation, to find out what to do with his car?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken by the plaintiff.

Q. Suppose he had been at Myers in his No. 25 territory from Ithaca to the Cayuga Rock Salt Plant at Myers and he had done all of this work and getting ready to put his car on the track? 820

By Mr. Heath: Objected to on the same grounds.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Go to Ludlowville or go to one of the trains and telephone in to Ithaca.

Q. Had you given instructions as to that? A. I had.

Q. And when he left Ithaca do you say whether it was or was not his duty to find out from Agent Clapp or some other operator where the trains were? A. It was his duty to find out from the operator on duty before he put his car on the track. 821

Recross examination by Mr. Heath:

Q. Exhibit D, Ernest, is the paper that counsel showed you which you testify was a printed list of

special rules for gasolene cars? A. Yes, sir.

322 Q. Was that in the hands of the employees on the branch roads? A. It was.

Q. In whose hands? A. In the hand of the section foreman and all that operated motor cars.

Q. Then you say this doesn't apply if it was a hand speeder? A. I say it does apply.

Q. The paper by its terms doesn't apply to hand speeders? A. That is for the operation of motor cars.

Q. This wasn't in the hands of McCarthy? A. Yes, sir, he operated a motor car.

Q. It wasn't in the hands of Rocco? A. No, sir.

323 Q. Because he operated a handcar? A. Yes, sir.

Q. This rule, Exhibit D, by its terms doesn't apply to Rocco? A. No.

Q. Now you say this is the only line that has these push cars? A. No, I didn't say it is the only line that has push cars. No, I say it is the only line that has special track walkers to protect the passenger trains.

Q. You go back of passenger trains? A. That is what it is for.

Q. That is what Rocco was out for to protect the train that hit him? A. No, sir.

324 Q. That is what you look to? A. Track walkers are to protect passenger trains especially.

Q. They work between certain hours and it is their duty to be out there during those hours regardless of where the trains are? A. Yes, sir, it is their duty to be out there.

Redirect examination by Mr. Cobb: 325

Q. Were these trains frequently late before that? A. Yes, sir.

ARTHUR D. BATES, being called as a witness in behalf of the defense in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Bates, where do you live? A. I live in Sayre, Pa.

Q. On the 8th of December, 1927, where did you live? A. I lived in Sayre, Pa. 326

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

Q. What were your duties at that time from the 13th of November, 1926, up to now? A. I am a conductor, passenger conductor.

Q. On the 13th of November, 1926, did you examine, with two other examiners, Mr. Joseph Rocco on rules? A. Yes, sir.

Q. And were you a conductor at that time? A. I was. 327

Q. And were you also an examiner? A. Yes, sir, employed as an examiner.

Q. By whom? A. Trainmaster, the superintendent.

Q. Who was that? A. F. J. Blauvelt of Auburn.

Q. He has charge of the Auburn and Ithaca

328 branch? A. Yes, sir.

Q. Is that Joseph Rocco's signature (indicating)? A. Yes, sir.

Q. You saw him sign it? A. Yes, sir.

Q. At that time do you know whether Mr. Pierce was supervisor of track of the Auburn and Ithaca branch? A. I think he was.

Q. Who was his superior, the Division Engineer? A. I don't know whether Mr. Cullen was or he had left.

Q. Who was the Division Engineer's superior at Auburn? A. The superintendent.

329 Q. Who was that? A. Mr. F. J. McGuire.

Q. Do you know when he came there? A. I think he came there in 1925.

Q. As an examiner you say you were appointed by the Superintendent? A. I believe I was notified by the Trainmaster but it came through the Superintendent.

Q. What are your duties? A. Examine engineers, firemen, conductors, trainmen, bridge foremen, section foremen, assistant foremen, agents, station agents and operators.

Q. Operators? A. I mean telegraph operators.

330 Q. Anyone else? A. Anyone else that was operating a car came under the train rules using a main track.

Q. Or a speeder? A. Yes, sir.

Q. Did you instruct Rocco at that time, November 15, 1926? A. On this day at Ithaca, November 15, 1926, yes, sir.

Q. Get right down to the question of the rule

book. Did you instruct him on the general rule book? A. Yes, sir. 331

Q. July 1, 1924? A. That question might not be clear to the Court. We instructed him on colors, sight, hearing and the use of signals and classification of signals, trains, marks, limits, etc., and his duty as a patrolman.

Q. Some of that was in this general rule book? A. Yes, sir, it was.

Q. Especially his duty as patrolman, was that in this rule book? A. Special rule was not in that book.

Q. What was that special duty that applies to Rocco as track walker? A. With reference to going 332 out, going to work, taking his speeder and going over his territory. We were instructed by our trainmaster to be sure and instruct——

By Mr. Heath: Object to what he told Rocco.

By the Court: You may tell what you told Rocco.

Q. What did you tell Rocco? A. I told Rocco that he must get in communication with the operator and the operator would get in communication with the train dispatcher and find out where the trains were, if any, before starting out on his trip.

Q. Did you tell him that that day? A. Yes, sir.

Q. Was that rule in force, do you know, on the 333 8th of December, 1927? A. Yes, sir.

Q. Is it in force now? A. It is.

Q. Never has been revoked after it was put into force, as far as you know? A. No, sir.

Q. He was to get in touch with who? A. The operator.

Q. Did you examine the operators at Ludlowville, Kings Ferry and Aurora? A. Yes, sir. 334

Q. Did you tell those men the same thing that you told Rocco?

By Mr. Heath: Objected to as incompetent, improper and not binding on this plaintiff.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. We instructed all the patrolmen. The same instructions were given them, all the same.

Q. That is on the Auburn and Ithaca branch? A. Yes, sir.

Q. Do you know of any other branch where those particular speeders are used? A. I don't. 335

Q. Where they have the track walkers patroling the trains? A. There is only on the Auburn Division.

Q. This is hand propelled? A. Yes, sir.

Q. How is it different? A. Cross piece down at your foot.

Q. Use hands and feet? A. Yes, sir.

Q. How many wheels? A. Three.

Q. You say this is the only division of the line that you know of? A. It is the only one on the Auburn Division.

Q. Do you swear that they are not used on the other divisions? A. No, sir. 336

Q. What does that include? A. Elmira, Cortland, Auburn, Ithaca. Sayre branch and Geneva.

Q. That is all? A. 320 miles.

Q. How many miles on this whole line?

By Mr. Heath: Objected to as incompetent, im-

proper and immaterial.

By the Court: Objection overruled. 337

Exception taken for the plaintiff.

A. That I couldn't say, I am not familiar with it.

Q. Did you ever go through an examination? A. Yes, sir.

Q. Before you give examinations don't you have to know something about the system, rules and regulations and equipment? A. Nothing about the equipment.

By the Court: Q. Is it correctly called a speeder, is it known among railroad men as a speeder? A. As a speeder. 338

Q. How heavy? A. You can pick up one very readily and take it off the track.

Q. How easily can it be done? A. There are two wheels on one side and to step off and pick that off the track is a short job.

Q. How quickly can you do it? A. Fifteen seconds. That would depend on your speed that you were traveling at the time.

Q. Suppose he was only going five miles an hour how quickly could you take it up? A. Very quickly.

Q. Your best idea? A. You have your brake to use and step off. I don't want to commit myself. 339

Q. Some things he has to do? A. Yes, sir.

Q. As I understand witness he carries some equipment for doing work? A. It is necessary.

Q. What equipment? A. He would have signals like green flag, white flag and torpedoes. If sent out after dark a red light. As far as other tools

340 probably a wrench for tightening bolts but for that I wouldn't want to say.

ADEN E. TRUMAN, having been called as a witness on behalf of the defense, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Truman, where do you live? A. I live at Cortland.

Q. In December 8, 1927, were you employed by the Lehigh Valley Railroad? A. I was.

341 Q. At what business? A. Locomotive engineer.

Q. I refer you to Rule 14, Subdivision D and I ask you if you are familiar with that rule, Subdivision D. Just read that to yourself. Do you know what that rule means? A. Yes, sir.

Q. What is running against current of traffic?

By Mr. Heath: Objected to as the rule book itself gives the definition.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

Q. What is it?

342 By Mr. Heath: Object to that, any characterization.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. That is, if I get your question right, that is the movement of trains on main track in one direction, that would be against the current of traffic, opposite direction which trains are moving.

Q. That would apply to single track the same as double track? A. Yes, sir. 343

Q. What do you say that means? A. If the traffic is going east and they want to run something west, that would be against the eastward traffic on the same track.

Q. I want to show you Exhibit No. 3 for identification and I ask you if you know what that is? A. Yes, sir.

Q. Did you act as an examiner on the 13th of November, 1926, of Joseph Rocco? A. I did.

Q. Is that his signature? A. That is his signature.

Q. You were appointed by whom? A. The trainmaster. 344

Q. Get right down to this point, did you or did you not hear him instructed either by you or Mr. Bates as to what he should do before putting his speeder on the track? A. I did.

Q. What did you hear? A. I heard him instructed that he was to go to the operator and have the operator call the train dispatcher and find out the condition of trains on his section before he obstructed the main track.

Q. Before he put his speeder on? A. Before he put anything on or obstructed the main track. 345

Q. You saw him and heard that instruction given? A. Yes, sir.

Q. And it was given? A. Yes, sir.

Q. Now was he instructed on other things at that time? A. Yes, sir.

Q. Did you examine him as to his eye sight? A. Eye sight, hearing and color.

346 Q. Signals? A. Signals, yes, sir.

Cross-examination by Mr. Heath:

Q. Who gave him this particular instruction, Mr. Truman, about going to the operator? A. Well, I couldn't say whether Mr. Bates examined this man or whether I examined him myself but those were the lines of instructions.

Q. How many did you examine? A. Several. We worked all day.

Q. You are not testifying to the specific instructions to Rocco but that was your general duty that day to instruct them on these rules and that is why
347 you do say that you instructed Rocco? A. Yes, sir.

Q. But you have no personal recollection? A. I couldn't say whether I instructed him or whether Mr. Bates.

Q. You haven't any personal recollection except that you generally instructed all that came before you? A. That is what I did.

Q. You had no recollection of Rocco? A. I expect I couldn't say which one of us gave him the examination.

Q. When you gave him the examination what did they do, take him into a special room? A. No, sir.

348 Q. Did you examine one man and Mr. Bates another man at the same time; how did you do it? A. They were all there in a room by ourselves, the men that are being examined.

Q. And you would take a man and Mr. Bates would take a man and go through the things that you would instruct them about? A. Yes, sir.

Q. Mr. Bates took a man and you another? A. Not necessarily. 349

Q. What do you mean? A. If Mr. Bates was, Mr. Bates would examine the man and I would take notes.

Q. Whether you examined Mr. Rocco or Mr. Bates examined Rocco, you couldn't say? A. No, sir.

Q. You don't know whether you examined Rocco at all? A. If Mr. Bates did, I didn't.

Q. If you examined him Bates didn't? A. No, sir.

Q. You don't know who did examine him? A. Either Mr. Bates or myself. 350

Q. You don't know that you did? A. No, I don't.

Q. You can't swear whether he ever got these instructions? A. I can, yes, sir.

Q. Positively? A. Yes, sir.

Q. You heard him give them? A. I heard Rocco get them.

Q. Who inspected him, you or Bates? A. I couldn't say who.

Q. When you were inspecting him Bates would know you were? A. We were close together.

Q. Yet you told this jury that you heard Rocco specifically instructed on the proposition of going to the operator? A. Certainly. 351

Q. Yet you couldn't say who done it? A. I couldn't say whether I did or Mr. Bates did.

Redirect examination by Mr. Cobb:

Q. You know he got those instructions? A. I know he did.

Aden E. Truman, for defendant, recross
Arthur D. Bates, for defendant, cross

352 *Recross examination* by Mr. Heath:

Q. You suppose he did? A. I know.

Q. Who gave them? A. Mr. Bates and myself.

Q. You can't say as you sit there who gave them? A. I couldn't say whether Mr. Bates did or I.

Q. Had you ever seen Rocco before? A. Yes, sir, I have seen him before.

Q. Where? A. At Ithaca.

Q. You knew him? A. Yes, sir, by sight, by name.

Q. You couldn't tell who examined him, you or 353 Bates? A. No, sir.

ARTHUR D. BATES, recalled for cross-examination by Mr. Heath.

Q. Mr. Bates, how many did you examine that day, on the 13th of November, 1926? A. Well, you would have to get the record from the trainmaster.

Q. Well, about? A. We left Auburn with a special train to examine agents and operators as we met them and stopped at the station. That is a long time ago and we came here to examine them and to say 354 how many you would have to count up the agents, etc.

Q. In other words you haven't any specific recollection of the people you examined? A. I have an idea.

Q. You would have to look to a record? A. Yes, sir.

Q. As Mr. Truman states, one examined a man

and one another? A. I would like to say for the benefit of the Court that they were examined in a class. At times we took one test, eye, hearing and color and we have our class in there. We have those separate. 355

Q. How many were in the class at that time that Rocco was in? A. Three or four.

Q. Who was there? A. There was the section foreman, who has passed away.

Q. What was his name? A. His name has been spoken.

Q. Who else, Mr. Bates? A. There was the section foreman and two bridge foremen, one Charley Monroe and the other I think was—well, as I remember, four or five. 356

Q. Do you recall who gave these specific instructions on operators to Rocco? A. I did.

Q. And you gave it specifically to Rocco? A. I did.

Q. And that you remember? A. Yes, sir.

Q. Where was Truman? A. Truman was present in the car.

Q. What was he doing? A. Sitting there listening, possibly he was taking a color test as the last examined, sitting in the car.

Q. What was he doing? A. He was sitting there listening. 357

Q. You say he might have been instructing someone? A. He was not.

Q. Might he have been? A. No, only one at a time.

Q. So you never did give instruction separately

at the same time; you to one and he to another? A.
358 That might have been done to an agent or operator but not in this particular case.

Q. It didn't happen in this particular case? A. No, sir.

Q. You were the one that gave the instruction and Truman sat there and listened? A. May I answer that by explaining?

Q. Sure. A. I was instructed by the trainmaster when we started out to be sure and have the entire instructors, three at the time, be present at all classes, not to split them up and take section foremen and bridge foremen.

359 Q. Did you obey that instruction? A. Absolutely.

Q. You say sometimes one examined operators and you were doing different work? A. They might have been taking a color test.

Q. They might not hear you? A. That was in the presence and hearing of the others.

Q. That was your information, since it was done in the hearing of the others; is that your explanation? A. I was present at all examinations.

Q. That is what you mean when you tell me that Truman was there and present; he was in the car?
360 A. Yes, sir.

Q. But what he was doing you won't say? A. Taking in the instructions.

Q. In this particular one? A. In all of them.

Q. About how many did you give that day? A. How many different classes?

Q. Yes. A. We will say eight or ten.

Q. Can you remember where Truman was on

every particular one? A. He was present.

Q. And listening? A. He wasn't out of hearing. 361

Q. You are not trying to fence me? A. I am not.

Q. You have testified that some time during that day he was doing other work? A. Not on this day.

Q. But was he perhaps testing them as to colors although he was in the same car while you were instructing on something else? A. No.

Q. Not on this day? A. No, sir.

Q. It happened on other days but on this particular day it wasn't so? A. It wasn't during that time.

Q. Didn't you testify that Truman was examining as to colors while you were instructing? A. It might have happened in the presence of the class. 362

Redirect examination by Mr. Cobb:

Q. Did you know Joseph Rocco? A. Yes, sir.

Q. Before this day November 13, 1926? A. Yes, sir.

Q. You knew he was a track walker on the division? A. Yes, sir.

Q. This was the record you brought (indicating)? A. Yes, sir.

Q. You didn't put down here everything you told him? A. You couldn't.

Q. Did you tell him he should go and find out from the operator before putting his speeder on the track? A. Yes, sir. 363

Record offered and received in evidence.

364 JOHN CLAPP, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Clapp, what is your business? A. Telegraph operator.

Q. Whereabouts? A. Ithaca, N. Y.

Q. For what company? A. Lehigh Valley.

Q. How long? A. For the last twenty-one years.

Q. Did you know Joseph Rocco in his lifetime? A. Yes, sir.

365 Q. On the 8th of December, 1927, did you go on duty as a telegraph operator? A. Yes, sir.

Q. What time? A. 8 o'clock in the morning.

Q. How long did you stay on duty? A. Until four in the afternoon.

Q. At your desk at the Lehigh Valley? A. Yes, sir.

Q. Did Joseph Rocco during that day see you in the afternoon or phone as to inspecting the track or putting his speeder on the track ahead of any train in the afternoon? A. He did not.

Q. What were his instructions on that?

366 By Mr. Heath: Object to that as to what this witness instructed him.

By the Court: Anything he personally instructed him.

A. The instructions that I know he is to report between the hours of 3:30 and 4:00 o'clock for information regarding the location of trains within the territory which he patrols.

Q. Did he appear or did he tell you or get in com-

munication with you in any way? A. No, sir, not on that day. 367

Q. If he had called between 3:30 and 4:00 o'clock did you know where this train was, 302? A. Yes, sir.

Q. Was 302 the passenger train coming from Auburn? A. Yes, sir.

Q. And was 303 the passenger train that left Ithaca at 4:55? A. That was the number.

Q. Was it the same train? A. Same equipment and train.

Q. Was it at 4:55 the same train that came in from Auburn late? A. Yes, sir.

Q. Did it have the gasolene car? A. Yes, sir. 368

Q. As 302 coming from Auburn? A. Yes, sir.

Q. Did it leave Ithaca at 4:55? A. I wouldn't be able to say as to that because I was off duty at 4 o'clock.

Q. Can you tell by this train sheet?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir.

Q. When did it leave? A. It left Ithaca at 4:55.

Q. That afternoon? A. Yes, sir. 369

Q. Now had Joseph Rocco called you up at any time before that train left that day or seen you to find out about it before he put his speeder on the track? A. No, sir.

Q. Had you instructed him personally as to what he should do before he put his speeder on the track? A. Yes, sir.

370 Q. Tell the jury. A. I would say that knowing his instructions he was to call up and find out the locations of the trains and on some occasions when he didn't do it——

By Mr. Heath: Object to what he knows.

By the Court: If there was a time you instructed him.

A. (Continuing) I would say that I instructed him more on his delinquence rather than his duties. He was to report to me for a line-up of the trains and on one or two occasions that I can remember prior to the accident I did tell him that he must be more careful and call me up.

371 Q. When? A. At the time he went on duty and find out the location of the trains.

Q. Did you tell him that personally? A. Yes, sir.

Q. How long before the accident? A. As to time I would say three months.

Q. Was the rule still in effect at the time of the accident? A. Yes, sir.

Q. Is it now? A. Yes, sir.

Q. When they called you up or come to see you about trains, what do you do? A. I call up the dispatcher.

372 Q. Where? A. At Auburn and ask him; tell him the track walker is leaving for Ludlowville and ask him the location of all trains; if there is anything out of the ordinary and then the regular schedule trains and the location of those trains at the same time. In the case of Rocco I would tell him the best figure I could, what given point he would be able to make; if the train had left yet.

Q. Then would you get a reply from him? A. Rocco?

873

Q. No, the dispatcher? A. Yes, sir.

Q. You telephoned the dispatcher that Rocco was leaving? A. I would simply ask for information as to the location of the trains. Then it was up to the track walker himself what time he wanted to leave to clear this train.

Q. If you heard from the train dispatcher that there was an extra or late train, what would you do if the track walker wanted to go on out? A. If the train was a regular train, had rights by the time table or schedule, I would say 302 left Ludlowville two hours late, whatever it happened to be, and if it was an extra train, freight or pick-up, the exact location at the time I received it.

874

Q. And you would tell that to the track walker? A. Yes, sir.

Q. So that he would know as much about the location of the trains as you did; is that right? A. Yes, sir.

Q. At the time of the accident was 302 running against the current of traffic? A. I wouldn't say against the current of traffic. I would say 302 was a regular train by schedule rights one way, an eastbound train, and did have a right to come into Ithaca any time.

875

Q. It had a right to be where it was? A. Yes, sir.

Q. And not running against the current of traffic? A. Yes, sir.

376 Q. Because it had to come in from Auburn to get to Ithaca? A. Yes, sir.

Q. And it was a regular schedule train? A. Yes, sir.

Q. But they do frequently come in late? A. Yes, sir.

Q. If Rocco had come to see you before he started out on his speeder shortly before this accident would you or could you have told him that day about this train?

By Mr. Heath: Objected to as calling for a conclusion.

377 By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir.

Cross-examination by Mr. Heath:

Q. Mr. Clapp, how long have you been telegraph operator down at this station, the Lehigh Valley? A. I came to Ithaca in 1910, some time in 1910.

Q. As an operator? A. Yes, sir.

Q. You have been an operator since 1910 here? A. Yes, sir.

Q. For eighteen years? A. Yes, sir.

Q. And this station is on the—I don't know whether you call it the main line from Buffalo to 378 New York—I don't know what you call it? A. It is the Ithaca branch.

Q. That is in addition to the Ithaca-Auburn branch? I am talking about the branch that goes to Geneva, etc.? A. That is the Ithaca branch of the Seneca Division.

Q. And your duties include operating work for

that branch too? A. Yes, sir.

379 Q. The train dispatcher for the Auburn and Ithaca branch was located at Auburn? A. Auburn, N. Y.

Q. You were under him, were you? A. Not necessarily under him. I am a Seneca Division man but I am under him as far as carrying out instructions regarding the movement of trains on the Auburn Division.

Q. You had known Joseph Rocco how long? A. I would say practically for as long as I have been in Ithaca.

Q. And during that time he was working for the Lehigh Valley Railroad Company? A. Yes, sir. 380

Q. You say that he didn't report to you, get in touch with you on the afternoon of December 8? A. Yes, sir.

Q. That is he did not? A. He did not.

Q. You knew that this train was late, did you? A. I did.

Q. And did he get in touch with you the day before? A. Yes, sir.

Q. And the day before that? A. I wouldn't say.

Q. Did you make any written record of when he got in touch with you or when he didn't? A. No records kept of that. 381

Q. You claim it was the rule that he must get in touch with you? A. Yes, sir.

Q. And you didn't make any written record of when he did or didn't? A. No, sir.

Q. Any order or information you may have given to him on any occasion did you give it in writing? A. No, it was all verbal.

382 Q. Did you make any report to your superior when he didn't report to you? A. Yes, sir.

Q. In writing? A. No, sir.

Q. So there was nothing in writing about this rule by written record as to failure to report or written record of any information that you gave? A. No written record.

Q. You say you don't know whether he reported to you two days before? A. No, sir.

Q. That is you don't know? A. I don't know, no, sir.

Q. How many times did you report verbally to your superiors that he violated this rule and didn't
383 report to you? A. On two occasions.

Q. And that is over a period of how long, how long was he on that job? A. Those two occasions were within a year of the time of the accident.

Q. You will say, won't you, that this oral rule was not lived up to? A. What oral rule?

Q. The rule that track inspectors should report to you? A. It was lived up to in a certain respect.

Q. At times it wasn't? A. At times he had slipped and didn't report.

Q. Only twice? A. On two occasions that I had told his superiors, his section foreman.

384 Q. That was McCarthy? A. Yes, sir.

Q. He is dead? A. Yes, sir.

Q. Did he fail to report any other times than those two times? A. Not that I know of, not that I can positively say.

Q. You stated to Judge Crowley before this trial that that rule wasn't lived up to? A. No, sir.

Q. In any event you never made a written report as to whether he got in touch with you or not? A. I never kept any record. 385

Q. Did you on some occasions talk with him over the telephone? A. He had phoned out over the telephone on some occasions but it wasn't a practice.

Q. When you say he phoned out, John, you mean he called you? A. Yes, sir.

Q. Sometimes you told McCarthy about the trains? A. Yes, sir, if he wished to know.

Q. And Joseph Rocco was under McCarthy? A. Yes, sir.

Q. McCarthy was Rocco's boss, is that so? A. Yes, sir.

Q. You don't know as a fact that Joseph Rocco didn't get information that that train was late? A. That he didn't get information that that train was late? 386

Q. Yes. A. Yes, sir, I do.

Q. How? A. Because he didn't get it from me.

Q. He might have got it from someone else? A. I don't believe that he could. I positively state that he couldn't.

Q. No one else down at Ithaca Station knew that that train was late except you? A. Probably employees on the Auburn Division that day knew that that train was late? 387

Q. Probably? A. They might have known; it was their business to know.

Q. When did you first know it? A. I knew that the train that you mean 302 was late?

388 Q. The one coming from Auburn? A. I should say at 10:30.

Q. It was due to leave at 10:30? A. Due to leave Auburn.

Q. It didn't leave until 11:35? A. Yes, sir.

Q. You knew it was late an hour before it left? A. Yes, sir.

Q. Did you attempt to get in touch with Joseph Rocco? A. No, sir.

Q. You say that the employees down at the station probably knew that the train was late? A. Yes, sir.

389 Q. And you mean all employees on this branch? A. I mean all employees that were interested in that station would know by finding out. I could have told them if they asked. I don't know what employees did ask.

Q. Will you say that nobody asked? A. I will say that Joseph Rocco didn't ask.

Q. Yes, John, you said that? A. Yes, sir.

Q. Do you say that nobody asked? A. I won't say he did.

Q. Will you say that nobody asked? A. I can't say that.

390 Q. They might have? A. Some other employees, yes.

Q. Joseph Rocco started out at this end of the line, did he not? A. He did.

Q. And you didn't get in touch with him or attempt to? A. No, sir.

By the Court: Q. Did you have it in your mind that morning that he didn't make any inquiry? A.

It wasn't his habit in the morning. 391

Q. Did you have it in your mind that he did? A. No, it wasn't the custom.

Q. It wasn't the custom? A. It wasn't the custom for me to notify him; it was for him to come to me.

Q. How often did he come? A. Usually every day at 3:30 or between 3:30 and 4 o'clock.

Re-direct examination by Mr. Cobb:

Q. Do you know whether he called up any time during the morning? A. No, sir.

Q. Did he get in communication with you at any time? A. No, sir. 392

Q. Who was on before you? A. Marion Slaight.

Q. Was he the operator before you? A. Yes, sir, I relieved him at 8 o'clock.

Recross examination by Mr. Heath:

Q. You knew that McCarthy was down at the track and went out in the morning? A. The work train left at 8:25 with workmen and ashes.

Q. Do you know McCarthy was on it? A. No, sir. I knew that workmen were on it.

Q. You knew that his gang had gone down on this work train? A. No, sir. 393

Q. Whose gang? A. I have no way of knowing.

Q. What gang could have gone on besides McCarthy's?

By Mr. Cobb: Objected to. He says he doesn't know.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defend-
394 ant.

A. The Ithaca gang or any extra gang that was with the work train. The work train came in from Auburn late every night and went out in the morning. They could have been any gang.

Q. You have heard that McCarthy was with that gang? A. I heard that testimony given.

MARION SLAGHT, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:
395

Examined by Mr. Cobb:

Q. Mr. Slaght, you live where? A. Ithaca, 523 W. Seneca Street.

Q. What is your business? A. Telegraph operator.

Q. For whom? A. Lehigh Valley Railroad.

Q. How long have you been? A. Between sixteen and seventeen years.

Q. At what place? A. Interlaken and Ithaca.

Q. And where were you in December, 1927? A.
396 Working at Ithaca.

Q. What were your hours? A. 12 midnight until 8 A. M.

Q. Did you know Joseph Rocco? A. Yes, sir.

Q. Will you tell us whether or not you saw him before you went off duty on December 8, 1927? A. No, I did not.

Q. Did he call you on the telephone? A. No, he did not. 397

Q. Did he make any inquiry from you as to the trains and their locations? A. No, not on this morning.

Q. Had he on other occasions? A. Yes, sir, he had on other occasions.

Q. Did you know he went to work at 6:30 in the morning? A. I knew that he was supposed to go to work at 6:30.

Q. On this day in question you didn't see him or he didn't call you? A. No, sir.

Cross-examination by Mr. Heath: 398

Q. You went off, Mr. Slaght, at 8 o'clock? A. 8 A. M.

Q. Did you make any written record of any time that he did report to you? A. No, I did not.

Q. Did you make any record when he didn't? A. No, I did not.

Q. Whenever he did report was all an oral transaction? A. Yes, sir.

Q. Did you ever report to a superior officer that he didn't report to you and live up to this rule? A. Yes, sir. Mr. McCarthy asked me if he did report and I told him he did. 399

Q. No written records? A. No, sir, no written records.

Q. Were you there when the work gang went out that morning? A. No, I went off at 8 A. M.

Q. What time did the work gang get off? A. I couldn't say, I was off duty.

400 Q. They went out when Mr. Clapp was on duty? A. Yes, sir.

Q. Can you tell us any date that he didn't report to you except this morning in question, this 8th day of December? A. No, I never kept any record and couldn't state any particular date.

Q. You know of no date? A. No, I know of no date when he didn't report.

SETH L. SHELDON, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as fol-
401 lows:

Examined by Mr. Cobb:

Q. Mr. Sheldon, you are a photographer? A. Yes, sir.

Q. In the City of Ithaca? A. Yes, sir.

Q. And are you employed by any particular person? A. No, sir.

Q. Work for yourself? A. Yes, sir.

Q. And did you take some photographs of the Lehigh tracks and the surroundings down below Stewart Park and the head of the lake? A. Yes, sir.

402 Q. Do you know when you did that? A. April 27, 1928.

Q. I show you defendant's Exhibit 1 and ask you if you took that photograph? A. I did.

Q. On the day you have stated? A. Yes, sir.

Q. Where did your camera set? A. It set in No. 1 about 150 feet east of a point where Joseph Rocco's accident occurred.

By Mr. Heath: Objected to as incompetent, improper. This witness doesn't know where the accident happened. 403

By the Court: It could be supplied.

Q. Did you learn from anyone where it did happen? A. Yes, sir.

Q. From whom? A. Mr. Douglass.

Q. Anyone else? A. The gentleman with him; I forget his name.

Q. Mr. Stevens? A. I think so.

Q. Is it the man in the picture? A. Yes, sir.

Q. Did he tell you where the accident happened? A. Yes, sir.

Q. You say in No. 1 it was 150 feet from the point of the accident? A. From where Mr. Stevens stood and Mr. Douglass was at the same point. 404

Q. And Mr. Stevens told you that was where the accident happened? A. Yes, sir.

Q. Where was it with respect to the rails of the track, your camera? A. It was east.

Q. 150 feet north or south from the point of the accident? A. South.

Q. Where was it with respect to the east rail? A. Just a little east.

Q. How high was the camera from the ground? A. Probably about five feet. 405

Q. What kind of a day was it when you took the picture? A. It was 2 P. M.

Q. And what kind of a day, clear or stormy? A. It was cloudy but clear.

Q. Now I show you Exhibit 2 for identification and ask you if you took that photograph? A. I did.

Q. And on the date you stated? A. Yes, sir.

406 Q. Now where was your camera that time? A. In the center of the track 30 feet south from where Mr. Stevens stood.

Q. And he told you the point of the accident? A. Yes, sir.

Q. And your camera was which side of the rails? A. It was between the rails.

Q. And about the same height from the ground? A. Yes, sir.

Q. Do you say that those two photographs, Exhibit 1 and 2 for identification, are a fair representation of the surroundings down there? A. Yes, sir,

407 I do.

Exhibits 1 and 2 offered and received in evidence without objection.

Cross-examination by Mr. Heath:

Q. Mr. Douglass, the claim agent of the Lehigh Valley, employed you to go down there and take some pictures? A. He did.

Q. And you took them where he told you to take them? A. I did.

Q. And Exhibit No. 1 you say you were east of the east rail? A. Yes, sir.

408 Q. How far east were you? A. I am unable to state the distance.

Q. You were over past the ties, evidently, weren't you, you know what I mean? A. Yes, sir.

Q. And you were over to the east and past the ties; that is right, isn't it? A. Yes, sir.

Q. You didn't take any picture at that point with your camera in the center of the rail? A. Yes, sir.

Q. Are these the only pictures that you took? A. They are. 409

Q. Was the camera on a tripod or did you hold it? A. On a tripod.

Q. Did you take any measurements of the distances over the roadbed? A. No, sir.

Q. Mr. Douglass didn't either? A. I don't think so.

Q. By tape or otherwise? A. No, sir.

Q. Did you make any notes as to just where you were when you took these pictures? A. I did.

Q. On those notes don't they show how far your camera was east of the track when you took No. 1? A. It does not. 410

Q. What does it show as to where your camera was when you took No. 2? A. It shows I was 30 feet east of the accident.

Q. You say east because Mr. Douglass told you that was the direction of the railroad? A. East on the railroad.

Q. That is all that it shows about that? A. Yes, sir.

Q. It doesn't show where the camera was in relation to the track? A. No, sir, it doesn't.

Q. In neither picture, 1 or 2, your record doesn't show? A. My record doesn't show. 411

Redirect examination by Mr. Cobb:

Q. In No. 1 I will ask you if you can state whether your tripod as you say was east of the rails, was it on the right of way? A. It was.

Q. And was it on the path or near the ties? A. Yes, sir.

Seth L. Sheldon, for defendant, recross
Seth L. Sheldon, for defendant, redirect

412 Q. And on Exhibit No. 2 can you state whether the tripod was between the rails or outside the rails? A. Between the rails.

Recross examination by Mr. Heath:

Q. You are telling about that, Mr. Sheldon, from looking at the picture and not from any record that you made at the time? A. Yes, sir.

Redirect examination by Mr. Cobb:

Q. Have you any recollection as to where they were as to the rails? A. That is my recollection, too.

413 Q. Looking at the picture and your recollection tells you they were where you told me? A. Yes, sir.

Recross examination by Mr. Heath:

Q. You have no recollection in No. 1 how far east of the rails your tripod was? A. It wasn't measured.

Q. And you have no recollection as to the distance? A. No, sir.

Redirect examination by Mr. Cobb:

Q. Can you tell how far it was from the east rail? A. I could estimate it.

By Mr. Heath: Objected to, an estimate.

By the Court: Objection overruled.

414 By Mr. Heath: Exception taken for the plaintiff.

By the Court: You may estimate it.

A. I would say from the picture that it was probably three feet from the rails.

MARION SLAGHT, recalled for further cross-examination by Mr. Heath: 415

Q. Mr. Slaght, did you report to Mr. Clapp when he went on duty the morning of December 8th that Mr. Rocco had not reported to you that morning? A. No, sir, I did not.

Q. And you didn't report that to McCarthy either? A. Not on this particular date.

J. ERNEST PIERCE, recalled by Mr. Cobb for further direct examination. 416

Q. Mr. Pierce, after Mr. Rocco's death did you get his book of rules? A. Yes, sir.

Q. Under date of July 1, 1924, which I hold in my hands? A. I can't tell whether that is my book.

Q. I didn't ask you if it is the book but a similar one? A. Yes, sir.

Q. What did you do with that book? A. I sent it in to Auburn to the Division Engineer's office.

By Mr. Cobb: I offer in evidence Rule 823:

"Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time, on any track, in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train." 417

By the Court: Received in evidence.

ARTHUR D. BATES, recalled by Mr. Cobb.

418 Q. Mr. Bates, when you examined Joseph Rocco on the 13th of November, 1926, what was the number of his book of rules? A. 3595.

Q. I show you book of rules and I show you subdivision D of Rule 14 and I ask you what kind of type that is in? A. Bold face type.

Q. The other rules on that page, take subdivision P, take any printing on that page, No. 21 on which subdivision D is, is that the same kind of type as D? A. No, it is not.

Q. How does it differ? A. Mild face type.

419 Q. And the other subdivision D is what? A. Bold face.

Q. As a railroad man does that indicate anything to you? A. Yes, sir.

Q. What?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

Exception taken for the plaintiff.

A. Bold face type indicates double track rule.

Q. Does that apply to a single track? A. It does not.

420 Q. Does subdivision D of Rule 14 or did it on the 8th of December, 1927, have any application to this Auburn Division?

By Mr. Heath: Objected to as calling for a conclusion.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

Q. Now, I ask you as a railroad man whether or not train 302 on the date in question was running against current of traffic? 421

By Mr. Heath: Objected to as this witness is located at Sayre; as far as that is concerned doesn't show that he ever worked on this division or the time these rules were in effect; not qualified as an expert. May I ask a preliminary question.

Q. On the 8th day of December, 1927, were you in Sayre? A. Well, I couldn't answer because I ran over the Sayre and North Fair Haven.

Q. That goes through Freeville on top of the hill? A. Yes, sir.

Q. Your run was not on this branch on which Rocco was killed? A. No, sir. 422

Q. And what happened there on that branch during that whole year you don't know anything about, do you, of your own knowledge? A. With reference to rules, working conditions or what?

Q. Working conditions? A. I didn't work on it.

Q. And you didn't know, did you? A. I know the conditions of this road because I ran over it for four years.

Q. When? A. 1897-8.

Q. Thirty years ago? A. Yes, sir.

Q. At least twenty-eight years before this accident; is that right? A. Yes, sir, and I ran there again in the years 1902-3. 423

By Mr. Heath: I renew my objection as the witness is not qualified as an expert.

By the Court: You may define what is meant by that?

Exception taken for the plaintiff.

424 Q. I ask you again if you know whether 302 was running against current of traffic?

By Mr. Heath: Same objection.

By the Court: Objection overruled.

Exception taken for the plaintiff.

A. I do know, yes, sir.

Q. Was it or was it not? A. It was not.

By Mr. Cobb: I move to strike out from the record where your Honor admitted subdivision D-14 in evidence as it has no application to this case.

By the Court: Motion denied.

425 By Mr. Cobb: Exception taken for the defendant.

Q. Your other examiner besides Mr. Truman was O. E. Bogardus, is that true? A. Yes, sir.

Cross-examination by Mr. Heath:

Q. Now, Mr. Bates, you claim to be an expert in the interpretation of rules and knowing what the duties of engineers were on this branch line of the Lehigh Valley Railroad Company in December, 1927; do you? A. I do if they haven't been changed.

Q. And you drove an engine over this line for four years yourself? A. No, I never was an engineer.

426 Q. You never were any engineer yourself? A. No, sir.

Q. What are you? A. Conductor.

Q. But you claim to be an expert as to the engineer's duties on the line just the same? A. As far as interpretation and living up to the provisions of the rules.

Q. Let me ask you a question, Mr. Bates; you say you have read this rule, subdivision D? A. Many times. 427

Q. And you see that running against current of traffic is followed by;— A. I believe so.

Q. Now, is your interpretation as an expert that all of the rest that follows in that paragraph is qualified by the words running against traffic? A. The words running against traffic applies to double track.

Q. Now, is your interpretation as an expert that all of the rest that follows in that paragraph is qualified by the words running against traffic? A. I so interpret it, yes, sir.

Q. What do you say the purpose of the semicolon is in the sentence, in that language? A. As the rule reads there to break. 428

Q. What do you say the purpose of the semicolon is in that construction? A. The purpose is to apply this rule against the current of traffic.

Q. And that only? A. Yes, sir.

Q. That is your interpretation? A. Yes, sir.

Q. So that if an engine is proceeding down the track where there are workmen ahead on a curve, around a curve, and it isn't running against traffic the engineer knows that the workmen are there, under this rule it isn't his duty to give any warning whatsoever; is that your interpretation? A. Yes, sir. 429

Q. In other words, even though an engineer knows that workmen are around a curve and on the track and working on the track, your interpretation of this rule is that it wasn't his duty to give any

warning whatever? A. When he was not running
430 against current of traffic.

Q. As far as you know, Mr. Bates, was there any rule in this company that requires workmen to be on watch when there are workmen ahead on the track and to give any warning? A. There is a rule with extra trains where the range of vision doesn't enable them to see to give a signal.

Q. There is such a rule? A. Yes, sir.

Q. When a train is not on schedule? A. Yes, sir.

Q. Where is that rule? A. In my book.

Q. That applies whether running against traffic
431 or not? A. That applies in all cases.

Q. You know the topography of this branch line between here, the Auburn and Ithaca branch? A. I do.

Q. And you know that there are lots of curves on it? A. Yes, sir.

Q. Around which an engineer can't see, and around which workmen on the tracks or on a speeder on the tracks can't see; is that true? A. Yes, sir.

Q. You haven't been operating over this line for within the last twenty years, have you? A. In the neighborhood of eighteen or twenty years.

432 Q. And you never operated as an engineer? A. Never.

Q. I understand you now that if a train is not running on a schedule and it approaches a curve where there are workmen ahead on the track or liable to be, that it is the duty, the engineer's duty, to blow the whistle or give warning of approach? A. All extra trains where the range of vision is such

that they can see and know workmen are ahead, must sound the whistle. 433

Q. Give warning? A. If they are extra.

Q. And to give warning to anyone that may be lawfully on the track; is that right? A. Yes, sir.

By the Court: Q. The witness is confining it to trains that haven't a schedule? A. Yes, sir.

Q. Suppose a train has a schedule and not on time? A. That wouldn't apply. When trains are on schedule workmen are to be prepared on their track on the schedule time of that train.

Q. But suppose it is on schedule? A. All time thereafter.

Q. Even though three hours late? A. Yes, sir. 434

Q. That is your interpretation as an expert? A. Yes, sir.

Q. You are still in the employ of this railroad company? A. Yes, sir.

Q. If you fell down on your duties in instruction, your duties to Mr. Rocco, it would mean something on your job?

By Mr. Cobb: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant. 435

A. Probably.

Q. If you testified in this lawsuit that you had fallen down on your job, you would be censured, too? A. Very likely.

Redirect examination by Mr. Cobb:

436 Q. This train 302 that was in this accident that killed Rocco was not an extra? A. No, regular schedule.

Q. So the engineer on that train didn't have to blow the whistle in approaching a curve where his vision was not obstructed?

By Mr. Heath: Objected to as incompetent and improper.

By the Court: Objection sustained.

Question withdrawn.

Q. Under your interpretation of the rules, as an 437 expert, would he?

By Mr. Heath: Objected to as incompetent and improper.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. He wouldn't have.

Q. This rule, subdivision D of 14, doesn't apply to this single track road? A. It does not.

Q. Under your interpretation? A. No, sir.

Q. And I ask you if that is the interpretation of experts who know these rules?

By Mr. Heath: Objected to as too comprehen- 438 sive.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

EARL O. BOGARDUS, having been called as a witness in the above entitled action on behalf of the defendant, after being first duly sworn, testified as follows: 489

Examined by Mr. Cobb:

Q. Mr. Bogardus, where do you reside? A. Auburn, N. Y.

Q. And what is your business? A. Telegraph operator.

Q. What was your business on November 13, 1926? A. I was a member of the board of examiners.

Q. And what else did you do? A. Extra dispatcher. 440

Q. Where? A. At Auburn.

Q. For the Lehigh Valley Railroad Company? A. Yes, sir.

Q. You were employed by them at that time? A. Yes, sir.

Q. Now, on the 13th of November, 1926, I show you defendant's Exhibit No. 3, is your name on that paper? A. Yes, sir.

Q. And do you know whether Joseph Rocco signed it or not? A. He did.

Q. Was he examined at that time by the committee? A. Yes, sir. 441

Q. I will ask you whether or not your committee or any one of them or all of you gave him any instructions as to calling the operator before he put his speeder on the track to inspect it or track walk it? A. Yes, sir, he was instructed.

Q. Do you know who instructed him? A. Mr.
442 Bates.

Q. What did you hear him tell him? A. Before he started out, before he put his speeder on the track, he must find the location of the trains.

Q. From whom? A. The operator.

Q. Where? A. In this case at Ithaca.

Q. Had you seen Rocco before that time as you know of? A. No, that was the first time.

Cross-examination by Mr. Heath:

Q. Did you ever see him after that? A. No, sir.

Q. This is the written report that you people
443 made of what you did? A. Yes, sir.

Q. And your report is complete on this Exhibit 3? A. Yes, sir.

Q. This report shows that you only instructed him on the book of rules, on the switch key and on the colors and on his hearing and on his eyesight? A. That is what this sheet shows.

Q. That sheet doesn't show that you instructed him outside of anything in your printed rules? A. That sheet doesn't show it.

Q. And this is the written report that you and Bates and Truman made of what took place? A.
444 That covers as far as it goes.

Q. On the 13th day of November, 1926, when you were making your report you didn't have down any oral rule or report? A. We didn't show that on the sheet.

Earl O. Bogardus, for defendant, redirect
Frank J. McCauley, for defendant, direct

Redirect examination by Mr. Cobb: 445

Q. Your report was complete as far as the book of rules was concerned that you examined him on? A. That was required of the book of rules that each employee held.

Q. At that time you did instruct him on certain rules outside of the book of rules? A. Yes, sir.

FRANK J. McCAULEY, having been called as a witness in behalf of the defendant in the above entitled case, after being first duly sworn, testified as follows: 446

Examined by Mr. Cobb:

Q. What is your business? A. Train dispatcher.

Q. Where? A. Auburn.

Q. For whom? A. Lehigh Valley Railroad Company.

Q. Were you such on the 8th day of December, 1927? A. Yes, sir.

Q. And I show you a dispatcher's record of the movement of trains on the 8th of December, 1927, purporting to be made on the 8th day of December, 1927, and I ask you if you ever saw that record before? A. Yes, sir, this is my record from 8 A. M. to 4 P. M. on that day. 447

Q. That is your record, is it? A. Yes, sir.

Q. Take train 302 out of Auburn, when did that leave Auburn? A. 11:30 A. M.

Q. What was the regular schedule time for that

448 train to leave Auburn? A. I think it was 10:30. I would have to look at the timetable.

Q. It did leave there at 11:30? A. Yes, sir.

Q. What time did it get to the next station towards Ithaca? A. Oakwood, arrived 10:40; left 10:41.

Q. Next station? A. Next station is Union Springs 11:53, left at 11:54.

Q. What was the next station? A. Lavana 12:06 and left at 12:31.

Q. And the next station? A. Aurora 1:47 and left at 2:12.

449 Q. What next? A. Kings Ferry 2:39 and left at 2:46.

Q. As the result of reports made to him and what he put down on the sheet?

By the Court: The real material things isn't in dispute that the train was behind time. This may only vary the length of time that it was behind time.

By Mr. Heath: I object on the ground that the witness isn't testifying to things of his own knowledge because he was in Auburn.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

450 By Mr. Cobb: It isn't anything that could vary the material facts except that we want to know all the data surrounding.

Q. What next? A. Lake Ridge, arrived 2:59, left at 3:01.

Q. Next? A. The next is Ludlowville, arrived 3:13, left at 3:14.

Q. What is the next? A. Ithaca, arrived at 4:00. 451

Q. What time did it leave Ithaca and go back to Auburn, No. 303?

By Mr. Heath: Objected to as incompetent, improper and witness was in Auburn and he can't testify of his own knowledge when the train left Ithaca; it is highly improper and hearsay.

By the Court: Objection overruled on the ground that it is collateral.

By Mr. Heath: Exception taken for the plaintiff.

By Mr. Heath: Is counsel offering this in evidence as a fact of when the train left Ludlowville or left Ithaca? 452

By Mr. Cobb: Record of what that train did.

By Mr. Heath: Are you offering it as part of your evidence?

By Mr. Cobb: Offering it as proof of what the record is.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Heath: Object to the statement of counsel and ask that the jury be instructed to disregard it.

By the Court: The jury should certainly disregard it. 453

Q. I will ask you this, Mr. McCauley, do you know whether train 302 as it ran that day was a regular scheduled train? A. It was.

Q. Do you know whether that train had been late on previous occasions, of your own knowledge? A. There are times when it has been late.

Cross-examination by Mr. Heath:

454 Q. Now, of course, Mr. McCauley, you have no actual knowledge of your own part as to when this train left Ludlowville on that date, of your own knowledge? A. Except as given me by the man whose duties are to report to me.

Q. So what you have testified to to counsel and what has already gone into the record is information on that paper which you now hold in your hand, made by you after someone else had told you the time the train left? A. Yes, sir.

Q. Will you kindly tell me what the running time of train 302 was on the schedule between Auburn
455 and Oakwood, I mean what the schedule running time was? A. 11 minutes my recollection is.

Q. Are you sure that is right? A. I would have to look at the timetable. To the best of my knowledge and belief it is.

Q. How long did it take to go from Auburn to Oakwood? A. The usual time that day, 11 minutes.

Q. What was the running time between Oakwood and your next station, Union Springs? A. I should say about twelve to thirteen minutes.

Q. Now, Mr. McCauley, the next stop beyond Union Springs was Lavana? A. The next reporting
456 stop; Farley was a flag station.

Q. The running time of 302 from Union Springs to Lavana was nine minutes? A. Yes, sir.

Q. How long did it take this time? A. It took twelve minutes to the arriving time at Lavana and at Lavana they laid from 12:06 to 1:31.

Q. Now the next reporting time was Aurora? A. Yes, sir.

Q. And the running time and schedule time from Lavana to Aurora was seven minutes? A. Seven minutes. 457

Q. Now, what was the time of that train? A. The time from Lavana to Aurora was sixteen minutes.

Q. So that took them nine minutes longer to run between Lavana and Aurora than the schedule time? A. Yes, sir.

Q. That is the actual running time of this train? A. That is the record of that day.

Q. The next one? A. They remained at Aurora from 1:47 to 2:12.

Q. They remained at Aurora from 1:47 to 2:12? 458 A. Yes, sir. That is 25 minutes they laid at Aurora.

Q. What was the next stop? A. The next was Kings Ferry.

Q. The running time and schedule from Aurora to Kings Ferry was about sixteen minutes? A. Yes, sir, and they were 26 minutes.

Q. So it took them ten minutes longer on this day in question to run from Aurora to Kings Ferry than the schedule time, that is so, Mr. McCauley, according to your record? A. Yes, sir.

Q. What we mean by that, after it started out of Aurora it took how many more minutes? A. They 459 took ten minutes longer.

Q. To run than it would under the schedule? A. Yes, sir.

Q. And that distance is how many miles? A. Seven miles and three-tenths.

Q. So that it took ten minutes longer to run 7.3

460 miles than the schedule time, that is so? A. Yes, sir, and at Kings Ferry they lay from 2:38 to 2:46, eight minutes more instead of one as usual.

Q. Then when they left Kings Ferry it was what time? A. 2:46.

Q. And the running time Kings Ferry to Lake Ridge is what? A. Fifteen minutes.

Q. How long did it take them on this day, according to your record? A. According to the record thirteen minutes to arrive and remained two minutes.

Q. Then as between Kings Ferry and Lake Ridge
461 they ran faster than the schedule time of running, isn't that so? A. According to this record but I will state that the time between Kings Ferry and Lake Ridge their time is slow there so they always usually make up there.

Q. I am asking you if the schedule time of this train from Kings Ferry to Lake Ridge was fifteen minutes? A. Yes, sir.

Q. And on this day thirteen minutes? A. Yes, sir.

Q. The actual time from Kings Ferry to Lake Ridge was thirteen minutes? A. Yes, sir.

462 Q. The next? A. Ludlowville.

Q. And the running time Lake Ridge to Ludlowville was fifteen minutes, was that so? A. Yes, sir.

Q. How long did it take them that day? A. Twelve minutes to arrive there.

Q. So that they ran from Lake Ridge to Ludlowville faster than the schedule time of that passenger train to run, did they not? A. Yes, sir.

Q. Now what time did they leave Ludlowville? A. One minute after arrival, 3:14. 463

Q. And the next point? A. Was Ithaca.

Q. Then, Mr. McCauley, you didn't get a report of where that train was after it left Ludlowville at 3:14, is that right? A. Yes, sir.

Q. And when that train arrived at Portland Point you don't know? A. No, sir.

Q. And you have no report from anybody at Portland Point when it did arrive? A. No, it isn't a reporting station.

Q. And the distance between Ludlowville and Ithaca is fourteen and one-half miles? A. Eight miles. 464

Q. Eight miles to the station? A. Yes, sir.

Q. But into the station 14.5? A. No. That would show the difference between 307 and 314.

Q. This State Street means the State Street just over opposite the D., L. & W. station? A. Yes, sir.

Q. And it doesn't include going on south and east as you call it to the condensary junction and back into the station? A. That would probably be half to three-quarters of a mile.

Q. It doesn't include that? A. No, sir.

Q. From 3:14 and a fraction when it left Ludlowville to 4 o'clock you, as train dispatcher, had no report of that train at all? A. No, sir. 465

Q. And therefore if Mr. Clapp, the operator, had called you up any time after 3:30 or 3:30 you couldn't have told him where that train was? A. No, sir, the only thing I could give him was the last report at Ludlowville.

466 Q. Now what was Mr. Clapp's practice, Mr. McCauley, in calling you up in relation to finding out where trains were say around three or 3:30 on afternoons? A. I would say it was a regular occurrence, daily, among several other stations.

Q. Several other stations did the same thing? A. Yes, sir.

Q. Did you make any record when they did call up? A. No, sir.

Q. Or you didn't make any record when they didn't? A. No, sir, I look to see the record of the trains.

467 Q. You didn't make any records when they didn't? A. No, sir, but my recollection is they called very frequently.

Q. But any particular day you can't say? A. Yes, sir, particularly after hearing of the accident I asked him if any inquiry had been made about 302 and they said no.

Q. That is all you know is what they told you? A. Yes, sir.

Q. You asked them here and they told you no? A. Yes, sir.

Q. That was after the accident? A. Yes, sir, that was after the accident.

468 *Redirect examination* by Mr. Cobb:

Q. Have you a record of that pick-up freight train that 8th day of December? A. Yes, sir.

Q. That day of the week was what day? A. That was on Thursday.

Q. What did the pick-up train do that day after it

left Auburn, can you tell me? A. Yes, sir. They went as far as Oakwood, where they turned around and came back to Auburn. They arrived at Oakwood at—they left Auburn at 8:15 and arrived at Oakwood at 8:19 and then returned to Auburn at 9:45 from Oakwood and left Auburn again at 10:20. The record shows they came to Auburn after material to repair the track. 469

Q. After they left Auburn the second time where did they go? A. Arrived at Oakwood at 10:50 and left there at 10:42 going east.

Q. Where did they go then? A. They arrived at Union Springs at 11:02 and left at 11:16 and arrived at Lavana at 11:25 and left at 11:35. 470

Q. Go on. A. That record shows that they arrived at Aurora at 3:20 and left at 3:53. They let the passenger by them between Lavana and Aurora.

Q. Which passenger train? A. This 302 that they speak about. That 3:20 may have been given me by some of them as having arrived at the siding this side of Aurora; and that is as far east as that train went that day.

Q. When did the passenger train go by there? A. The passenger train arrived at 1:47 and left at 2:12. The passenger train evidently passed the freight train at a siding north of Aurora station, however, about three-fourths of a mile from there, that they call Lyons siding. 471

Q. Have you got a record of when that pick-up train went back from Aurora to Auburn that day? A. Yes, sir.

472 Q. When? A. 726 left Aurora at 4:10 and arrived at Auburn at 5:35.

Q. Was that the train that you have been telling me about? A. Yes, sir, the freight train.

Q. So that it went no farther than Aurora? A. No farther east than Aurora that day according to the records.

Q. Counsel asked you if you had any record of 320 after it left Ludlowville, is that right? A. That is right. There is no reporting station between Ludlowville and Ithaca.

473 Q. If Mr. Clapp asked you where that train was after it left Ludlowville you could have told him when it left Ludlowville? A. Yes, sir, I probaby gave him that information; that is the reply that I would make, the last report.

Q. If Mr. Rocco had called up or gone to see Mr. Clapp he could have found out, too? A. Certainly.

Recross examination by Mr. Heath:

Q. Have you any record that Clapp did call you up and ask you where the train was? A. No written record.

Q. Have you any recollection? A. After hearing of the accident I asked Mr. Clapp if he had any
474 inquiry about this train and he said no.

Q. From who? A. The track walker.

Q. I am asking you did Clapp inquire of you? A. Not that day.

Q. So Clapp didn't know any of the time where that train was that day? A. Not from me except from what he might have heard from these records.

Q. You have no record or recollection of his call-

ing you up that day? A. He usually designates what he wants to know about.

475

Q. Did he call you up? A. Not that day, not that afternoon.

Q. What does your records show as to any freight trains from Aurora on into Ithaca that afternoon? A. There is none from Aurora. There was a freight train left Ludlowville at 2:30.

Q. 2:30 on the afternoon of December 8th, 1927? A. Yes, sir.

Q. And that freight train was going towards Ithaca? A. Yes, sir.

Q. Give us your record as to the running of that freight train? A. The record shows that arrived in Ithaca at 4:45 and that was made by a man other than I. I got through at 4 o'clock.

476

Q. The record shows a freight train got in here at 4:45? A. Yes, sir.

Q. And left Ludlowville at 2:30? A. Yes, sir.

Re-re-direct examination by Mr. Cobb:

Q. Where did the passenger train pass that freight train?

By Mr. Heath: Objected to on the ground that this witness has no record.

By the Court: Objection sustained.

477

By Mr. Cobb: Exception taken for the defendant.

Q. Mr. McCauley, you say that that freight train left Ludlowville that afternoon in reply to counsel's question at what time? A. 2:30.

Q. Have you got a record as to where that train next stopped? A. I haven't any record on this

478 sheet to show except the natural inference would be at Portland Point.

By Mr. Heath: Object to what the natural inference would be and ask that it be stricken out.

By the Court: Objection sustained and motion to strike out granted.

Q. Your record doesn't show where it stopped? A. No, sir.

Q. Now the passenger train 302, does that show when that arrived in Ithaca? A. At 4 o'clock.

By the Court: Q. What time did you say the train 302 left Ludlowville for Ithaca? A. 3:14.

479 Q. Then that was the last that you had on your record until 4 o'clock? A. Yes, sir.

Re-re-cross examination by Mr. Heath:

Q. Then as to the freight train, Mr. McCauley, the only record that you have as to the freight is that it left Ludlowville at 2:30 and arrived at Ithaca at 4:45? A. That is right.

Q. So that the freight train left Ludlowville before the passenger train? A. Forty-four minutes before the passenger train.

480 *Re-re-re-direct examination* by Mr. Cobb:

Q. Have you got a record of when the passenger train left Portland Point? A. No, sir.

Re-re-re-cross examination by Mr. Heath:

Q. No record of any other stop after Ludlowville? A. No, sir, not on that train sheet.

Frank J. McCauley, for defendant, re-redirect
Edward J. Cullen, for defendant, direct

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481 *Re-re-re-re-direct examination* by Mr. Cobb:

Q. How far is Portland Point from Ludlowville? A. Practically a mile.

Q. Is there a siding at Portland Point? A. Yes, sir, a good siding.

EDWARD J. CULLEN, having been called as a witness in behalf of the defendant, in the above entitled action, after being first duly sworn, testified as follows:

482 *Examined* by Mr. Cobb:

Q. Mr. Cullen were you the Division Engineer at Auburn N. Y., of the Lehigh Valley Railroad Company? A. Yes, sir.

Q. When? A. October, 1920, to February, 1926.

Q. Now, as Division Engineer at that time, what were your duties? A. I had supervision over the maintenance and construction on the Auburn Divisions, the maintenance and way department.

Q. And who was your supervisor at that time? A. We had three supervisors, Mr. Pierce was stationed at Auburn and later transferred to Ithaca, 483 Mr. Christiance at Auburn and Mr. Cashman at Cortland.

Q. Over the Auburn and Ithaca Branch you say Mr. Pierce was the supervisor of tracks? A. Yes, sir.

Q. He was the next man below you in rank? A. In track maintenance.

484 Q. Under him on that division who was the next man in rank? A. The section foreman.

Q. Then who next? A. Then the laborers, track walkers, etc.

Q. I show you a book of rules, general book of rules that took effect July 1, 1924, and I ask you if you are familiar with Rule 14, sub-division D? A. Yes, sir.

Q. The type of Sub-division D is different from the type of the other rules on that page? A. Yes, sir.

485 Q. In what respect? A. Sub-division D is bold face type and the other light face.

Q. As a railroad man what does that indicate to you? A. All bold face rules are double track rules and apply to double track operations only.

Q. If that is true, that had no application to this Ithaca-Auburn Branch? A. No, sir, it isn't a double track. The Auburn branch is single track.

Q. In Sub-division D I want to ask you as a railroad man whether or not train 302, this passenger train in question on December 8, 1927, was running against the current of traffic? A. No, sir.

486 Q. There are other rules in that book that govern the operation and govern the laborers on the Auburn and Ithaca Branch? A. Yes, sir.

Q. I ask was it true or not there was a special rule which wasn't in that book that applies to track walkers on the Auburn and Ithaca Branch as to what they should do with respect to calling up the operator before putting their speeder on the track? A. Yes, sir.

Q. Do you know about when that rule went into effect? A. On the Auburn and Ithaca Branch I would say about the latter part of October or early November, 1920. 487

Q. Who promulgated that rule? A. I did.

Q. And what was it? A. The rule was that the track walkers couldn't occupy the main track with speeder cars or any other obstructions without first ascertaining from the operator the whereabouts of approaching trains in both directions.

Q. Did you instruct Mr. Pierce as to that? A. Yes, sir, and the other supervisors also.

Q. Now, at that time, did you know Joseph Rocco? A. No, I did not. 488

Q. Did you know him later than 1920? A. I have seen the man on the track working back and forth but I couldn't tell you his name.

Q. What kind of a conveyance did they have to operate? A. Small speeder car that was propelled by hand, worked by a small pinion gear against a larger gear which moved the rear wheel and propelled the car in that manner.

Q. Was there any other rule other than that that applies to this location between Ithaca and Auburn insofar as those track walkers were concerned relative to their calling up before putting their speeder on the track? A. There was a set of motor car rules that governed the operation of motor cars. 489

Q. I mean as to this particular speeder that this man operated? A. Any other rules?

Q. Any other written rule that applied to the

hand operated speeder? A. I would have to look
490 the rule book over.

Q. I show you Exhibit D, you stated that is what? A. It is a rule governing the operation, maintenance and care of motor cars.

Q. By motor cars you mean what? A. Gasoline engine propelled motor cars, a small motor car, the various sizes carry anywhere from two to 20 to 30 men and also propelled trailers.

Q. Is there a rule that applies to those cars? A. The mtor cars?

Q. Yes. A. Yes, sir.

Q. What is that?

491 By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: I don't think the testimony is competent unless it refers to hand propelled or something other than motor propelled cars.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Cobb: I offer to show that there is a similar rule as this rule. The witness Cullen has now stated was in effect by his promulgation that controlled the track walkers in respect to putting their speeders on the track and calling up before they did so.

492 By the Court: I am not holding that you can't do that. I am holding you cannot read this printed rule. If there is such a rule, I will admit it.

By the Court: Sustain the original objection.

By Mr. Heath: Objection withdrawn.

By Mr. Heath: Objected to as Sub-division D is the best evidence.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

By the Court: Repeat your question. 493

Q. I ask you if there was a rule that applied to motor cars that was printed that was similar to this that you have just given us that applied to these track walkers before they put their speeders on the track, about calling up the operators?

By Mr. Heath: Object to the form of the question simply because there is a printed rule, Sub-division D and it can be put in evidence.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

Q. Now, Mr. Cullen, I show you Exhibit D, marked for identification, and I ask you to read the second paragraph? 494

By Mr. Heath: Object to the reading of the second paragraph until the exhibit has been offered in evidence.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Cobb: I offer in evidence the second paragraph of Exhibit D for identification.

By the Court: Received in evidence.

Q. Will you read it into the record? A. "Motor car operators must communicate with the dispatcher either directly or through the nearest available agent or operator if at all possible to do so to ascertain whether all schedule trains due have passed and the location of extra trains, before using the main track. If there is no telephone or telegraph office immediately available, motor cars must run care- 495

496 fully to the nearest phone booth or open telegraph office."

Cross-examination by Mr. Heath:

Q. Now, Mr. Cullen, this special rule the operators of push speeders was not included in Exhibit D, was it? A. No.

Q. And that rule was conveyed by word of mouth, was it? A. Yes, sir.

Q. And you were the Division Engineer of the Auburn and Ithaca Branch for six years, weren't you? A. Yes, sir.

497 Q. And during that six years you was there was this special rule over that branch which you were the Division Engineer of, that wasn't in writing? A. Yes, sir.

Q. That is your testimony? A. Yes, sir.

Q. And you know, Mr. Cullen, that the counsel has read to you from Exhibit D the paragraph that you urge does not apply to a speeder that is a push car? A. To gasoline cars.

Q. It doesn't apply to the speeder that Joseph Rocco had? A. It applies to motor cars. The rule proper didn't apply.

498 Q. It applies where we have a gasoline motor? A. Yes, sir.

Q. And there was no written rule as to reporting to the operator for a man that has a push speeder? A. No, sir.

By Mr. Cobb: I desire at this time to strike from the evidence the rule book of July 1st, 1924, No. 14, Sub-division D of those rules as they have no appli-

cation whatsoever to this train No. 302 of this accident in question. 499

By the Court: Motion denied.

By Mr. Cobb: Exception taken for the defendant.

DANIEL J. SILKE, having been called as a witness in behalf of the defendant, in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Silke, where do you live? A. Auburn, N. Y. 500

Q. What is your business? A. Locomotive engineer.

Q. How long have you been a locomotive engineer? A. Twenty-four years.

Q. For whom? A. Lehigh Valley Railroad Company.

Q. All of that time? A. Yes, sir.

Q. Did you know Joseph Rocco? A. I don't know.

Q. Prior to the 8th of December, 1927, where was your run and where was it on that day? A. Between Auburn and Ithaca. 501

Q. And on what train did you leave on that day; where from? A. I left Ithaca on 301 and went to Auburn and left Auburn on 302.

Q. Was it the same train? A. Yes, sir.

Q. Going one way it is even number and the other way odd number? A. Yes, sir.

Q. Who was your electrician on the train that day? A. Mr. Wright.

Q. What is his first name? A. I don't know his
502 first name.

Q. Do you recall the 8th of December, 1927? A. I do.

Q. As you left Ludlowville that day do you know where you passed, if at all, the freight train? A. I think we passed them at Portland Point.

Q. And where was that? A. Where?

Q. Where was the freight train? A. I think we backed on the siding and they backed by us.

Q. What do you mean by that? A. They were on the main track east of the siding and we pulled in on the siding and they backed up, they couldn't get
503 in.

Q. How did you get by? A. Went back in the siding and they backed up the main track.

Q. They backed up the main track towards Auburn or Ithaca? A. Auburn.

Q. So that let you go back on the main track and get ahead of them, is that right? A. Yes, sir.

Q. Have you a record or did you keep a record at that time of the times that you left the station? A. I did not, no, sir.

Q. On whose order did you leave? A. We left on our what we call our rights, running rights.

504 Q. Who was in charge of your train? A. The conductor.

Q. And did you take orders from him as to when you left? A. The signal is all.

Q. He gave you a signal when to start? A. Yes, sir.

Q. So you operated the train directly under the conductor? A. Yes, sir.

Q. Who was he that day? A. Mr. Carrigan, Thomas Carrigan. 505

Q. You were late, were you not? A. Yes, sir, we were.

Q. What was the reason, do you know? A. Washout along the track.

Q. As you approached the Remington Salt Block from that point on, as you continued, tell the jury what you saw and what you did in the operation as engineer of that train? A. Well, I don't recall anything that happened out of the ordinary until we passed the Remington Salt Works.

Q. As you passed it? A. Until after we passed it. There are three or four road crossings between Portland Point and Remington and I started the bell ringing at McKinney's landing. 506

Q. Where is McKinney's with respect to the Salt Block? A. McKinneys is half a mile west of the Salt Block, or north.

Q. Is that a regular station or flag station? A. Flag station.

Q. Is that where the cottages are between Willow Point north of the salt plant? A. Practically at the end of the cottages, the north end.

Q. At McKinneys you started the bell? A. I started the bell going into McKinneys and the bell is an automatic bell and it continues to ring all down through there. 507

Q. All down through where? A. From McKinneys down past the Salt Works and there were three or four crossings between McKinneys and Remington Salt Works and the whistle was blown for those

508 three or four crossings and we also blew it before we passed Remington Salt Block.

Q. Did you that day? A. We did.

Q. What is the signal for crossings? A. Two long, one short and one long.

Q. What kind of a bell was there on this engine? A. What they call an automatic.

Q. When you started the bell ringing did it continue to ring until you shut it off? A. Yes, sir.

Q. Was it ringing from the time you started it at McKinneys continuously? A. It was.

Q. Had you shut it off? A. No, sir.

509 Q. The whistle was what kind of a whistle? A. An air whistle, operated by compressed air.

Q. And how as to the sound, describe it? A. That would be a hard proposition.

Q. Can't you give the jury some idea as to its extent? A. It is a good deal on the same plan, sounds more like an automobile but much louder. It doesn't resemble a steam locomotive.

Q. How does it compare with a steam locomotive as to the extent of the sound? A. I should think it would carry about as far as a steam locomotive.

Q. Was it working properly that day? A. Yes, sir.

510 Q. And was the bell ringing properly? A. Yes, sir.

Q. And was all the equipment that you had there working properly? A. As far as I know.

Q. Were the brakes working all right? A. The brakes were working all right.

Q. After you passed the Salt Block tell us what

you saw and what you did? A. After we passed the Salt Block I started to whistle for the Stewart Park crossing, at the whistling post, and I was still blowing the whistle when I saw a man's head on the track ahead of me over some foliage along the track. I didn't know at the time it was someone walking along the track and just then we came around in view and I saw the track walker when he had end of the speeder off the rail. He stood with one foot alongside of the rail and one outside and he was behind the speeder with the back wheel of the speeder clear of the tracks. He had it picked up clear in his hands. I stopped blowing the crossing whistle. 511

Q. About how far away were you when you saw him? A. I can't tell you exactly. I should think about 100 feet, maybe 150. I got up within fifty feet and I saw he was going to try to stick to the speeder and stuck my head out of the window and hollered get off the track and we got up within maybe twenty feet of where he was and I was sitting behind the glass and I knew if anything fell through the glass that it would break it and possibly cut me and so I had already applied the brakes, the emergency. 512

Q. When? A. When I saw he had the car on the track. 513

Q. As soon as you saw his head? A. No, as soon as I saw the car.

Q. How far were you away when you saw the car? A. I judge about 100 feet, possibly 150, or it might be shorter; I wouldn't attempt to say.

Q. What do you mean by applying the brakes and

emergency? A. I used all the braking power at my
514 command.

Q. What did you have to do to do that? A. Simply move a lever about that long (indicating) and bring it to a position from about here to there (indicating), about six inches.

Q. And what did that do? A. Applied the brakes and the emergency.

Q. Are there air brakes? A. There are air brakes.

Q. When you applied the brakes and emergency how fast would you say your train was going? A. I should say 30 miles an hour approximately.

515 Q. Now what was the speed limit around that curve, if there was any?

By Mr. Heath? Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. 35 miles.

Q. After you applied the brakes and emergency did the brakes take hold? A. They did.

Q. They were working properly, you say? A. Yes, sir, they were as far as I know.

Q. And as the train continued after the brakes
516 were applied you say you saw the man in behind the speeder? A. That is where he was all the time and he acted as though——

By Mr. Heath: Object to "he acted as though".

By the Court: Just describe his movements without any conclusions.

Q. Can you describe what he was doing? A. He was trying to get the car off the track.

Q. How close to him did you holler? A. I imagine twenty-five feet. 517

Q. Do you know whether he heard you? A. No, I don't.

Q. During that time was the sharp blast of the whistle blowing? A. Yes, sir, the whistle was blowing up to that time.

Q. Do you say the whistle had blown continuously from the time you started it? A. Four crossings. The whistle started to blow at the whistling post and I had made two sounds of the whistle when I saw this head.

Q. You recognize on this map the lay of the track? A. Yes, sir. 518

Q. Do you recognize this whistling post as designated on the map? A. Yes, sir.

Q. The bell was ringing before this? A. Yes, sir.

Q. And was ringing all the time? A. It wasn't shut off from the time we left the little flag station at the north.

Q. Of course your train went on and struck him? A. Yes, sir.

Q. And killed him? A. I didn't know I killed him until after I stopped and got off.

Q. Your train stopped where? A. At the crossing at Stewart Park. 519

Q. The front end of your engine was where with respect to the crossing? A. Just over.

Q. That train was how long? A. Two cars.

Q. About how long? A. I think about one hundred feet; I don't know exactly the length of those

520 cars; we had the two cars.

Q. You say about one hundred feet? A. I should say approximately.

Q. I will ask you this, do you say that you did everything that you could after you applied the emergency brakes?

By Mr. Heath: Objected to as calling for a conclusion.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

A. Yes, sir, that is all I could do.

Q. After you left the Remington Salt Block and as you came to that and passed it, where were you in 521 this gasolene car? A. I was on the right hand side.

Q. And what was in front of you? A. Nothing but a window, a glass window.

Q. Was your vision good through that? A. Yes, sir.

Q. Was there any time that you looked any other way than straight through this window after you left the Salt Block? A. No, sir.

Q. Do you say that you saw this man as soon as you could have seen him?

By Mr. Heath: Objected to as improper, calling for a conclusion.

522 By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

Q. I saw the man as soon as he came around the curve, his head and shoulders.

Q. Could you have seen him any sooner than you did?

By Mr. Heath: Same objection.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff. 523

A. I don't think I could have seen him any sooner.

Q. You did stop the train and then you learned that there had been this accident? A. No, I didn't go back. There was an automobile on the crossing and I had to go back or I did go back and relieve the brakes off the cars so I could get them off quicker than pump them off by the engine.

Q. And then did you back off the crossing? A. Yes, sir.

Q. Backed to where the accident was? A. Yes, sir.

Q. Do you know what time it was that this accident happened? A. No, I don't exactly. 524

Q. How fast do you say that the ends of the train was moving at the time of the impact? A. It hadn't reduced speed very much.

Q. Do you say you were going thirty miles an hour; how fast do you say you were going at the time of the impact? A. Possibly 25 miles.

Q. Was the rail dry or wet at that time? A. Wet. The water was washing up off from the lake.

Cross-examination by Mr. Heath:

Q. Mr. Silke, how long have you been acting as engineer on the Auburn and Ithaca branch? A. At the time of the accident? 525

Q. Yes, up to the time of the accident? A. About six or seven months. I went on there in March.

Q. And where were you operating before you

came onto this branch? A. Between Auburn,
526 North Fair Haven and Sayre.

Q. As engineer? A. Yes, sir.

Q. You were provided with a book of rules of the defendant? A. Yes, sir.

Q. With one similar to the one I am showing you, that defendant's counsel has produced? A. Yes, sir.

Q. And you knew those rules, didn't you? A. Yes, sir.

Q. How long had you been operating this gasolene car that you was using on that day? A. I went on that run in March prior to that date.

527 Q. March, 1927? A. Yes, sir.

Q. How long had you been operating gasolene motor trains? A. Since March.

Q. Prior to that time you were operating steam engines? A. Steam.

Q. Traveling at a speed of thirty miles per hour an application of your emergency brake and that braking apparatus that you had there that day within what distance could you stop that train? A. I couldn't tell you without trying it out and measuring the distance.

Q. You have never tried it? A. No, sir.

528 Q. You have never been furnished with any information within what distance you could stop a train going thirty miles an hour? A. Not that I know of under those conditions.

Q. Under any conditions have you ever had any information as to what distance you could stop it? A. No.

Q. Whether the track was dry or wet, you didn't have any instructions about it? A. You couldn't have. 529

Q. You didn't have? A. No, sir.

Q. On the curve particularly just east of the boathouse was the track wet? A. You mean at the place of the accident?

Q. You see a map, Exhibit B, Mr. Silke? A. Yes, sir.

Q. You see this boathouse just west of the track in the curve in the bend? A. Yes, sir.

Q. What was the condition of the rails right along the side of those boathouses? A. Pretty wet and some places dried off a short distance. 530

Q. Right opposite the boathouse, how was it? A. Where the boathouse protected that one it was dry. Between the boathouse it was wet.

Q. Did you put on your brakes as you went into the curve? A. I put on my emergency brakes when I saw the speeder on the track.

Q. Your service application? A. I didn't use it at all.

Q. And you went into that curve at thirty miles an hour? A. About that, yes, sir.

Q. And at no time did you put on the service application of the brakes. I mean while you were in that curve or coming out of it? A. No. 531

Q. You left Auburn an hour late, did you not? A. We left Auburn late. I don't just recall; the train sheet will show.

Q. You can't recall how late it was? A. I don't know exactly.

532 Q. Did you know at that time? A. I did, yes.

Q. But you don't know now? A. I don't remember. That is quite a while ago. I don't remember what time we left Auburn.

Q. What is your running time between Aurora and Kings Ferry, schedule running time? A. Between Aurora and Kings Ferry?

Q. Yes. A. I think it is sixteen minutes.

Q. On this day it was twenty-six minutes? A. I don't know.

Q. Did you take more than fifteen minutes? A. I don't know.

533 Q. Did you lose time from the time you left Auburn to the time of the accident I mean as regards schedule? A. I possibly did, there were washouts all along the road.

Q. Did you on this particular run? A. We lost time, yes.

Q. How much? A. I don't know.

Q. Fifteen minutes? A. I couldn't tell you.

Q. You can't tell us whether you lost fifteen minutes time from the time you left Auburn and the time of this accident? A. Yes, sir, we lost probably more than fifteen minutes.

534 Q. How much more? A. I couldn't give you any estimate.

Q. You won't attempt to give us any estimate beyond fifteen minutes of the length of time that you lost? A. We stood at Lavana more than fifteen minutes and at Aurora more than fifteen minutes alone.

Q. What, in your best judgment, is the amount of

time you lost on your running time from the time you left Auburn? A. All I can give you is the time we left Auburn and arrive in Ithaca. 595

Q. And from the time along that track you made no reckoning of how much you were behind time? A. We were running for safety that day.

Q. You didn't have in your mind at any time on that run how much you were behind your schedule time of running? Is that so? A. Not exactly.

Q. Give us your best judgment. A. I knew I was late and losing time all the time but there was no help.

Q. You didn't lose time all the time? A. Not after we got by Kings Ferry. 596

Q. Beyond Lake Ridge you made up some time? A. We possibly did.

Q. In other words you propelled that train faster than schedule time? A. I may have run faster than the schedule time but not faster than the speed limit.

Q. You get my question; you ran much faster than the schedule time between Kings Ferry and Lake Ridge? A. Yes, sir.

Q. That you remember? A. No, only as I heard the evidence from the train sheet this morning.

Q. You didn't recall that from your own recollection but you heard it from the train sheet when Mr. McCauley was on the stand this morning? A. I knew that I made up time. 597

Q. That was over a year ago? A. A year ago last December.

Q. Is that why you don't remember or didn't you charge your knowledge? A. Running over the line

from one day to another you can't recall.

538 Q. That is a fact, isn't it, Mr. Silke? A. Yes, sir.

Q. As you left McKinneys and was approaching the Salt Block there were three or four crossings? A. Between McKinneys and the Salt Block?

Q. Yes. A. Yes, sir.

Q. You blow your whistles at each one of those grade crossings? A. Yes, sir.

Q. You recall that? A. Yes, sir.

Q. Each one of those grade crossings do you blow? A. Yes, sir.

Q. What do you blow? A. Two long, one short
539 and one long.

Q. Is that the signal you gave south of the Salt Block? A. No, I hadn't finished it.

Q. That was the signal you started to give? A. Yes, sir.

Q. You are familiar with the rules of the company you say? A. Yes, sir.

Q. I call your attention to page 20, subdivision L of Rule 14. Will you tell us what the rule book says the grade crossing signal is? A. Two long and two short.

Q. That wasn't the signal that you gave down
540 there at this crossing, was it, Mr. Silke? A. No, sir.

Q. But you do have a distinct recollection of blowing the whistle at those three or four crossings between McKinneys and the Salt Block? A. I do, yes, sir.

Q. Did you blow the whistle at the crossing next north of McKinneys? A. There is no crossing north of McKinneys.

Q. Between McKinneys and Ludlowville is there a grade crossing? A. Nothing between McKinneys and Portland Point. 541

Q. I said Ludlowville? A. Crossing at Portland Point.

Q. Did you blow the whistle? A. We came to a dead stop before we got to the crossing.

Q. Did you give the whistle before you approached that crossing? A. No, we came to a dead stop.

Q. So when you started up and went over that crossing you didn't give the crossing whistle? A. No, sir.

Q. What is the crossing next north of that? A. Just above the salt mine. 542

Q. Did you blow your whistle at that point? A. Yes, sir.

Q. Did you blow your whistle at every crossing north of the Salt Block to Auburn? A. Yes, sir.

Q. Your testimony is that you blew your whistle at every crossing that you crossed on the route to Ithaca except Portland Point? A. If I am coming to a stop on the crossing I don't blow it.

Q. Have you now, as you sit there, a distinct recollection of blowing your whistle next north of McKinneys? A. Yes, sir, I have. 543

Q. A distinct recollection of the second one? A. I had a distinct recollection of blowing a whistle on every crossing.

Q. Are you testifying that you blew the whistle at every crossing because it is your duty? A. It is because I blew it.

544 Q. If you testified that you didn't blow your whistle at a crossing, you would be penalized for this? A. I don't know.

Q. If you didn't blow and there was a fatality you would be penalized? A. I ought to be.

Q. You know it as you sit there? A. Yes, sir.

Q. And this very accident in question, you know if it occurred by reason of your failure to blow the whistle, you would be penalized? A. Yes, sir, and might be killed myself.

Q. I am talking about being penalized by this defendant months or weeks after the accident? A. I know.

545 Q. When you talk about being killed, Mr. Silke, do you know, is there a danger to passenger train, as it came around that curve, of being derailed if it hit a speeder? A. Absolutely, yes, sir.

Q. You were going thirty miles an hour when the emergency was put on? A. Yes, sir.

Q. There was considerable danger of that speeder and you coming together and causing a derailment? A. Yes, sir.

Q. You had live passengers, human beings on your train, didn't you? A. Yes, sir.

546 Q. How far away from you was Rocco when you first saw his head? A. I imagine about 150 feet, as near as I can say it now.

Q. The first time that you saw Joseph Rocco's head he was from 150 to 100 feet away from you? A. Yes, sir.

Q. Would you say in your best judgment that it was nearer 100 than 150 feet? A. I couldn't tell

you exactly, it happened so quickly.

547 Q. Within a distance of fifty feet you can't specify, is that right? A. Yes, sir.

Q. And how far did you travel from the time you saw this head until the time you saw the speeder? A. I can't tell you how far I traveled.

Q. About? A. I couldn't tell you about. I saw saw his head until the time you saw the speeder? on the track.

Q. How far did you go from the time you saw his head until you saw the speeder? A. I can guess at it and you, too, 100 feet.

548 Q. You think you went one hundred feet from the time you saw his head until you saw the speeder itself? A. No, I should think about fifty feet. I think I was about fifty feet nearer when I saw the speeder than when I saw him.

Q. The first thing you saw of Rocco was his head? A. Head and shoulders.

Q. And you went about fifty feet before you saw the speeder? A. Yes, sir.

Q. It was when you saw the speeder that you put on the emergency? A. When I saw the car on the track.

Q. That is right? A. Yes, sir.

549 Q. During that short time, as I understand you, you were in the process of giving and continuing the crossing whistle? A. The station whistle.

Q. The station whistle? A. The crossing whistle at the park.

Q. There is a difference between crossing and station whistle? A. Yes, sir.

Q. You were giving the crossing whistle? A. Yes, sir.

Q. As soon as you saw the speeder you put on the emergency brake? A. Yes, sir.

Q. At that time you were going thirty miles an hour? A. Yes, sir.

Q. So then your train proceeded between fifty and one hundred feet before it hit him after you put on the emergency brake, is that right? A. Yes, sir.

Q. And when you were fifty feet away from him you put your head out of the window and called to him? A. No, I was nearer than that.

Q. All right, give us your judgment. A. Just that time, put my head out and hollered to him and ducked back in and got behind the radiator in front of the window.

Q. As you proceeded along there you had the side window open? A. Yes, sir.

Q. Window in front on right hand side directly in front where you were? A. Yes, sir.

Q. How large was that window? A. I don't know. I imagine about eighteen or twenty inches square.

Q. And as you proceeded along there that day were you sitting on a stool? A. I was.

Q. A stool that wasn't nailed or fastened to the floor or in a fixed position? A. It is located alongside of the cab.

Q. It is located alongside of the cab? A. Fastened to the side of the cab.

Q. One of those that drop down? A. Hinged on the side and drops down and put it up and a standard under it.

Q. How far does it come up? A. About the same height as a chair. 553

Q. As you were proceeding along that track that day were you sitting or standing? A. Sitting.

Q. About how far do you say it was from the floor? A. I should say about the size of an ordinary chair.

Q. About how far is that? A. I don't know without measuring it.

Q. Give us your best judgment? A. About eighteen inches from the floor.

Q. How tall are you? A. Five feet, ten and one-half inches.

Q. And this twenty-inch square window was about how high from the floor, that is the bottom of it? A. Why I imagine about two feet, possibly a little more. 554

Q. That is the bottom of the window was about two feet from the floor? A. Yes, sir.

Q. And about eighteen inches square? A. I would say about eighteen or twenty inches square.

Q. There was a wind blowing? A. Northwest wind.

Q. In what direction was that blowing in regards to the train? A. In that location it was blowing kind of across the motor. 555

Q. After you started to make the turn it certainly was? A. Yes, sir.

Q. As you were going down into the curve it wasn't blowing diagonally across so much, was it? A. It was kind of against the car all the way over.

556 Q. As you were approaching that track, look at the map, Exhibit B, look at the track from the Salt Block to the curve, the wind was blowing in about the same direction you were going? A. I don't know in what direction the track runs there but I know the wind was on my side all the way.

Q. You looked out of the window when you called to him? A. Yes, sir, leaned out.

Q. Was the emergency on then? A. Yes, sir.

Q. Was the car slowing up? A. Yes, sir, it was.

Q. Very much? A. Not much.

Q. Were you blowing the whistle? A. I was not
557 at that time. I had let go of the whistle. I saw that he was looking at us and there was no use blowing.

Q. You saw him looking at you? A. Yes, sir.

Q. And his head was up looking at you? A. I wouldn't say he was looking at us, he was facing us.

Q. You don't know whether he was looking at you? A. No, sir.

Q. Was his head up? A. I couldn't say that. When I hollered first he had picked the rear of the car off the rail.

Q. You were twenty feet away? A. More than that.

558 Q. How far away when you hollered? A. Twenty feet, is that what you mean?

Q. You were twenty feet away when you hollered at him? A. I judge twenty feet or twenty-five.

Q. When you hollered at him in what position was he? A. He was facing us.

Q. Facing you. Could you tell whether his head was up or down? A. I couldn't, no.

Q. You saw him, saw he was looking at you? A. I think he must. 559

Q. So you stopped blowing the whistle? A. Yes, sir.

Q. So you were proceeding then a little under thirty miles an hour because you were slowing up some? A. Yes, sir.

Q. You stuck your head out and called? A. Yes, sir.

Q. Did he look up? A. I don't remember.

Q. And then you ducked back? A. Then I jumped back.

Q. And were you looking ahead when the collision took place? A. I was. 560

Q. Were you looking ahead as you approached down this track that day after you left the Salt Block? A. Yes, sir.

Q. To see if anything was on the track? A. I was.

Q. You have in view this general topography way down to Stewart Park? A. Yes, sir.

Q. You were endeavoring to see if anybody along there was on the track? A. I was unable.

Q. You were endeavoring to see if anybody along there was on the track? A. Oh, yes.

Q. Where does this electrician sit? A. He was standing just back of me. 561

Q. Looking out of the front window? A. Yes, sir.

Q. How close? A. In back of my seat.

Q. What are his duties? A. His duties are to ride the car and see that it works all right.

562 Q. You mean he drives the motor or takes your place? A. No, sir.

Q. You don't mean he is there every day? A. He isn't there every day.

Q. But on this trip he was in the car? A. On this trip he was in the car.

Q. And standing directly back of you? A. Yes, sir. He was riding directly back of me. I don't recall whether he was going to Ithaca to make repairs or something over there or what his business was, but I do know when he rides on the car he always rides in the engine room.

563 Q. Does he always stand behind you? A. No, not particularly.

Q. You knew he was this day? A. Yes, sir.

Q. He is in the employ of the Lehigh Valley Railroad Company? A. Yes, sir.

Q. Have you and he talked this matter over after the accident? A. Not that I know of.

Q. Haven't talked it at all? A. No, sir.

Q. Not a word, you and he since the accident? A. May have passed a few words about it.

Q. When? A. At the time of the accident.

Q. Shortly after the accident? A. Yes, sir.

Q. Have you seen him since? A. Yes, sir.

564 Q. You haven't talked to him about it? A. Nothing that happened at the time.

Q. Anything about the accident? A. No, sir.

Q. Has he been stopping at the same place you have here in Ithaca? A. No, sir.

Q. Have you seen him since you have been here? A. Yes, sir.

Q. Talked with him? A. Yes, sir.

Q. Anything about the accident? A. Not that I know of. 565

Q. You say that he had the speeder up off the track? A. The hind wheel.

Q. Just explain, describe this speeder to us, two wheels on one side and one on the other? A. Two wheels, one back of the other.

Q. On each side? A. The right side goes a ways and there is a bar across from that frame and the wheel on each end of this. There is a bar from over here to the other rail and a wheel on this side, just enough to connect up.

Q. The single wheel is on the left? A. Yes, sir. 566

Q. And the car itself as it sets on the ground is more heavy on the right than it is on the left? A. Yes, sir.

Q. But it has a flange on the wheel on the left as it moves along that keeps it from going off the track? A. Yes, sir.

Q. And the light part of that speeder was the left side? A. The light part.

Q. Just where in between the rails was he standing? A. One foot outside and one inside.

Q. Which side? A. Right hand side, just as if this was the rail (indicating).

Q. And he was lifting on the heavy side of the speeder? A. His tool box is on the front end in front of the front wheel, just ahead of this cross stick. 567

Q. He was lifting on the right hand side, is that right? A. Yes, sir.

Q. But you say that the rear wheel was off the

568 rail? A. The rear wheel was off the rail.

Q. That was up in the air? A. Yes, sir.

Q. And you say that? A. Yes, sir, I saw that the first thing.

Q. In the fifty feet that you were proceeding just after you saw the speeder? A. I think I said around one hundred feet when I saw the car on the track.

Q. Will you put it at 100 feet? A. That is what I said, approximately.

Q. When you were 100 feet away he was lifting the speeder? A. He had it raised off the rail.

Q. When you saw him? A. Yes, sir.

569 Q. What else did you see him do? A. I say he acted as though he was trying to set that wheel off.

Q. Trying to set the rear wheel off? A. Yes, sir.

Q. When you were going thirty miles an hour how many feet are you going per second? A. I don't know.

Q. You never figured it? A. No, sir.

Q. How long have you been a railroad engineer? A. Twenty-four years.

Q. At any rate there was a crash? A. There was a crash, yes, sir.

Q. Then what did you do? A. I didn't do anything; there was nothing I could do.

570 Q. Where were you when the crash came? A. Just back of the radiator, just back of the window.

Q. Your hands on the levers? A. No, sir.

Q. And did you touch the levers from the time after the crash until the train came to a stop? A. No, sir.

Q. This train came to a stop you say down at this

entrance to Stewart Park, south of the Rappuzzi hotel? A. What? 571

Q. This train came to a stop you say down at this entrance to Stewart Park south of Rappuzzi hotel? A. No, sir, along the first crossing you come to.

Q. There is an entrance into Stewart Park south of the Rappuzzi hotel? A. I think there is two there.

Q. One is south of the Rappuzzi hotel? A. I don't know the name of that hotel you speak of.

Q. You know of the building right there? A. There is a cement building.

Q. As a matter of fact you backed up your train and some of you went into that hotel and tried to telephone? A. Not me. 572

Q. Did you see anyone go in there and telephone? A. No, sir.

Q. You didn't get out of your cab? A. I got out of my cab as soon as the train stopped.

Q. Where did you go? A. I went around and looked at the front end.

Q. Then what? A. I released the brakes on the train and backed off the crossing.

Q. Then what? A. I waited for the crew to come back.

Q. You didn't go down where Mr. Rocco was at all? A. No, sir. 573

Q. Do you recall a little girl coming along this track after the accident going in a northerly direction and going by your cab? A. A girl?

Q. Yes. A. No, sir.

Q. You didn't see any such girl? A. No, sir.

Q. You recall seeing no such person at all? A.
574 No, sir.

Q. You will swear that you didn't go past the crossing and entrance to Stewart Park that is south of the hotel? A. I know I didn't because I stopped on the crossing. There were automobiles waiting to get across.

Q. You will swear you didn't go down to this railroad bridge? A. Absolutely, yes, sir.

Q. As you looked across here (indicating) you say you were looking out? A. Looking ahead.

Q. You didn't see Rocco until you were 100 or 150 feet away from him? A. No, sir.

575 Q. Do you know where you passed the freight? A. Portland Point.

Q. Are you sure? A. Quite sure, yes.

Q. You said this morning you thought, do you know or is it you are quite sure? A. I am certain because we backed in there to let them back back.

Q. Now you say that this whistle was an air compressed whistle? A. Yes, sir.

Q. And sounds very much like an automobile whistle? A. Sounds more like an automobile than a steam engine.

Q. More like an automobile than an ordinary
576 railroad train? A. It does.

Q. How far did your train go after you applied the emergency brakes until you stopped? A. I don't know; it went to that crossing.

Q. Have you looked to see since the accident? A. I never asked the question.

Q. Have you ever looked to observe? A. No.

Q. You haven't? A. Only just as I went over it afterwards. 577

Q. You go down that track every other day? A. Every day four times, going this way twice and the other way twice.

Q. And every time that you approach that crossing you say that you blow your whistle back there at the whistling post? A. Yes, sir, every time.

Q. You are the only engineer that operates that four times a day? A. No, only two days a week.

Q. What days? A. Wednesday and Thursday.

Q. You operate it aside from that? A. I haven't been on there since last March.

Q. You didn't put your service brakes on at any time? A. I did not. 578

Q. At or near the point of accident? A. No, sir.

Q. Do you know what time this accident happened? A. No, I don't.

Q. Did you look at your watch to find out? A. No, sir.

Q. You had no idea then or have no idea now? A. No, not exactly.

Q. Do you know how heavy that train is? A. No, I don't, not in pounds.

Q. Do you know where the body was after the accident? A. No. 579

Q. You didn't go back at all? A. No, sir.

Q. You didn't see it from where you were? A. No.

Q. Do you know who asked Stevens to go back and flag the freight? A. I didn't know that he went back.

580 Q. Do you recognize this lady at all, Mr. Silke? A. No, sir.

Q. Did you see her on the day of the accident directly after the accident? A. I did not.

Q. And did you say in her presence this or this in substance, that you didn't see Rocco before the accident? A. I didn't say that in anyone's presence. There was no one around there.

Q. Around where? A. Around the front of the engine.

Q. Do you know who looked after the body? A. No, I did not.

581 *Redirect examination* by Mr. Cobb:

Q. Now you have told counsel that you didn't give the whistle under Rule 14, subdivision L, didn't you? That was two long and two short. Did you give the whistle according to Rule 31? A. Yes, sir.

Q. What is that? A. At the present time it is two long and one short and one long for a road crossing.

Q. What does Rule 31 say? A. The whistle must be sounded approaching public crossings at grade, as per Rule 12 (1), and at all other places where required by rule or by law, and at all whistling posts.

582 The sounding of the highway crossing whistle warning should be so performed as to start the first blast at the whistle post, making the length of each blast and interval between blasts such as to prolong the full completion of the warning to a point not to exceed two hundred (200) feet from the crossing. Enginemen on slow moving trains will, where neces-

sary, sound a second warning to properly accomplish this result. 583

Q. Did you sound the whistle that day according to that rule? A. I did.

Q. At the crossing north of the Remington Salt Plant? A. There are two or three crossings between there and Ludlowville.

Q. Did you sound that same blast at the whistling post and on where Rocco was struck? A. I did.

Q. You say that you haven't been running this trip since last March, 1928? A. No, sir, I haven't.

Q. Have you been running any? A. I am running at present between North Fair Haven and Sayre. 584

Q. When you applied the emergency brakes can you apply the service brake after that? A. No, sir.

Q. Which is the stronger brakes? A. The emergency.

Q. And after the emergency brakes are once applied they are on until the train stops? A. They are on until the train stops, yes, sir, until they are released.

Q. Did you release them? A. No, sir.

Q. So after you saw this man and speeder and put on the emergency brakes they were on until the train stopped? A. Yes, sir. 585

Q. You told the counsel that there was danger in having on the emergency brakes? A. No, I don't think I did.

Q. Is there any danger in putting on emergency brakes at any time going thirty miles an hour? A. No, not that I know of.

586 Q. That is as to passengers, derailing the train, do you say it is a dangerous thing to do? A. No, sir, I don't.

Q. Did you know that this speeder or this man was on this track when you first saw it or saw his head? A. I thought it was someone just walking along the track.

Q. You mean when you saw his head and shoulders? A. Yes, sir.

Q. At that time you couldn't even see his speeder? A. I couldn't see his speeder at all.

Q. When you did see his speeder then was the first time you knew that it was the track walker? A. 587 Yes, sir.

Q. And do you say that that was about 100 feet away? A. That is as near as I can estimate it, 100 feet. It may have been more and it might have been less. In a case like that it is pretty hard for a man to take all that down.

Q. As near as you can estimate it was 100 feet? A. Yes, sir, as near as I can estimate it.

Q. You do say the tracks of the rails were wet? A. Yes, sir, all the way to Auburn.

Recross examination by Mr. Heath:

588 Q. But, Mr. Silke, you have a definite recollection of giving all of these crossing signals way back even to Auburn on this particular day, haven't you? A. Yes, sir.

Q. On every day? A. Every day.

Q. When you read that Rule 31, page 43, it says the whistle must be sounded approaching public

crossings at grade as per Rule L-14? A. Yes, sir.

589 Q. Will you turn to 14-1 in this very book you have read out of and read 14-1, page 20, what does that say? A. Two long and two short.

Q. Now you say to counsel that that rule has been changed, has it? A. Yes, sir.

Q. That was changed orally? A. I think so.

By Mr. Cobb: Objected to as improper.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

Q. Was this rule book that you have in your hand in force at the time of the accident? A. It was.

590 Q. But this particular Rule 1-14 wasn't in effect as it was there? A. It wasn't the way it is here.

Q. It had been changed orally, that is the way someone told you. It was two long, one short and one long? A. There was a bulletin notice posted to that effect.

Q. When was that bulletin put out? A. I don't know as I can tell but a short time after this book went into effect.

Q. Four or five years ago? A. Yes, sir.

Redirect examination by Mr. Cobb:

Q. The bulletin was posted after July 1, 1924?

591 A. I can't recall.

Q. When did that book take effect, look in there and see? A. July 1st, 1924.

Q. The bulletin was put out after that, changing that whistle? A. Yes, sir.

Q. Now it is in the book Rule 31? A. I think it it, yes, sir.

592 *Recross examination* by Mr. Heath:

Q. What is in the book? A. Rule 31.

NELSON WRIGHT, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Wright, you are deaf? A. Yes, sir.

593 Q. Where do you live? A. Auburn, N. Y.

Q. What is your business? A. Electrician for the Lehigh Valley Railroad.

Q. How long have you been? A. I worked for them two different times, about fourteen years.

Q. How does riding on one of those trains affect your hearing? A. Not a bit, I can hear better there than here.

Q. Do you inspect engines to see whether there are knocks in them? A. I look over gas engines.

Q. How can you tell? A. I can hear very plainly, better than some men here could.

594 Q. Can you explain why you can do that? A. Where there is more noise around you don't hear all the noise, it is a good deal plainer.

Q. When there is noise around you can hear better than when not? A. Yes, sir.

Q. Do you have to rely on a sense of hearing to tell you when an engine knocks? A. No, sir.

Q. Were you on this train with Dan Silke? A. Yes, sir. 595

Q. Where were you? A. I was standing right back of Mr. Silke.

Q. Where was he? A. Mr. Silke was sitting in the engineer's seat.

Q. You stood back of him? A. Yes, sir.

Q. What was you doing? A. Just looking ahead at the time. I was on there doing some work.

Q. Did you see the accident? A. Yes, sir.

Q. Did you hear any signals before the accident? A. Yes, sir.

Q. Where? A. Above the curve the whistle blew and the bell was ringing. 596

Q. Did you hear that? A. Yes, sir.

Q. Where did he commence to blow for the first time as he approached the curve? A. Above the curve.

Q. North of the curve? A. Yes, sir.

Q. What was the signal? A. The whistle signal and the bell ringing signal.

Q. How many blasts of the whistle? A. Four.

Q. Did you hear that? A. Yes, sir.

Q. How fast was the car running when it went into the curve? A. Between twenty-five and thirty miles an hour. I don't think it was going over thirty. 597

Q. When did you first see Rocco? A. Just as we hit the curve I got around in sight.

Q. What do you mean by that? A. Come around like that (indicating) and Rocco was going this way.

Q. And then you saw him? A. Yes, sir.

598 Q. How far away were you from him when you first saw him? A. I would say in the neighborhood of one hundred to 150 feet.

Q. What was Rocco doing? A. He was standing on the track when I first saw him back of the hand car.

Q. What kind of a car? A. One of those push cars, what they use for track walking.

Q. And he was standing back of that? A. Yes, sir.

Q. What was he doing? A. He ran around the car and came up on the front side of it.

599 Q. What do you mean? A. We were going this way.

Q. You were coming south? A. Yes, sir. He was going north. He ran around the end of the car and came around the north side of it.

Q. Do you know whether or not the engineer applied any brakes? A. I certainly do.

Q. Where? A. Just after he hit the curve and saw Rocco he put them into emergency.

Q. Do you know when he saw him? A. I don't know whether he saw him the same time.

Q. As to the time you saw him when did he apply the brakes? A. Just as soon as I saw Rocco.

600 Q. Then he applied the brakes? A. Yes, sir, he must have seen him the time I did.

Q. The time you saw Rocco the engineer applied the brakes? A. Yes, sir.

Q. After that what happened? A. Well, I couldn't say when we hit him. We went I should

say four or five hundred feet and we stopped. I didn't go back.

601

Q. Were the brakes applied all the time until you stopped? A. Yes, sir.

Q. Do you know whether they were service brakes or emergency brakes? A. I couldn't swear as to that.

Q. Was anybody else in there with you in that cab? A. Not that I noticed. There was a lot of noise and I was looking ahead. I don't think there was. There wasn't any one to my knowledge.

Q. Were you looking back of you? A. Not any of the time.

Q. Where were you when you commenced to stand back of Silke? A. I rode behind Mr. Silke all the way from Auburn to Ithaca.

602

Q. Do you know who E. F. Testate is? A. Yes, sir.

Q. Who is he? A. Mail man on the Auburn Division.

Q. Do you know whether he was right back of you at the time of the accident? A. I don't because I didn't look back but I knew that he was on the train.

Q. Do you know who he is employed by? A. United States government.:

603

Cross-examination by Mr. Heath:

Q. What kind of work were you doing? A. Riding around in the gas and electric I mentioned.

Q. What work? A. Supplying some brushes to a big generator.

Q. Was that work all over with when you

started from Auburn? A. Yes, sir.

Q. You say you stood right behind Mr. Silke all the way from Auburn to Ithaca? A. Yes, sir.

Q. Looking out that window? A. Straight ahead.

Q. You were watching to see if he blew signals? A. Yes, sir.

Q. Your mind wasn't on whether the brushes were working all right? A. Nothing the matter with the brushes, that's what I was riding for.

Q. That is what you were riding for? A. Yes, sir.

Q. You had your mind on whether he gave his signals? A. Yes, sir.

Q. He gave his signals at every crossing he passed after he left Auburn? A. Yes, sir.

Q. That is you will swear to? A. Yes, sir.

Q. He even gave it at the Portland crossing? A. Yes, sir.

Q. You remember that? A. Yes, sir.

Q. You remember that just as well as crossing signals at the whistling posts? A. Yes, sir.

Q. You have been a witness for the Lehigh Valley before? A. No, sir.

Q. You have worked for them how long? A. Fourteen years.

Q. Working for them now? A. Yes, sir.

Q. After this accident you made a statement in writing and gave to Mr. Douglas? A. Yes, sir.

Q. And you know he has it now, don't you? A. Yes, sir.

EMILE F. TESTUT, having been called as a witness in behalf of the defendant, in the above entitled action, after being first duly sworn, testified as follows: 607

Examined by Mr. Cobb:

Q. Mr. Testut, where do you live? A. Ithaca.

Q. What is your business? A. Postal clerk on the trains.

Q. For whom are you employed? A. Government.

Q. United States government? A. Yes, sir.

Q. Do you remember whether or not you were on this train when an accident happened to Rocco? A. Yes, sir, I was. 608

Q. Now, just after the train passed Remington Salt block where were you at that time? A. I don't remember about it. I was very busy along there. I was going home to my dinner and I don't know much about the location of the crossings and I stepped into the engine room just before we were going around that curve where those trees are. I happened to be in there.

Q. Your mail room is the next room? A. Yes, sir.

Q. Directly? A. Yes, sir, this looks like my side. 609

Q. So you could open that and step in there? A. Yes, sir.

Q. Before the train got to the curve? A. No, sir.

Q. Any reason? A. We had had trouble with the tracks and I wanted the door open so I could jump if necessary. We had several occasions.

Q. You knew they had wash-outs? A. Yes, sir,
610 nine years.

Q. You were there with your work? A. Yes, sir, and riding home to my dinner.

Q. The train was late? A. Yes, sir.

Q. As you stepped in there you say that the engine had gotten as far as the whistling post?

By Mr. Heath: Objected to as leading.

By the Court: Objection overruled.

By Mr. Heath: Exception taken for the plaintiff.

Q. First I will ask you if you know where the whistling post is? A. I really don't know. When I am working the mail I am very busy.

611 Q. This Exhibit B you can see? A. Yes, sir.

Q. Here is the Salt Block down there, you know where that is? A. Yes, sir.

Q. Somewhere between that Salt Block and before the engine hit Rocco you stepped into where the compartment is for the engine? A. Yes, sir, just before we struck those trees and bushes.

Q. Tell me where you mean here on the map? A. I don't know as I could tell you exactly. I could not say with the map because I am not familiar with the roads but I know as I stepped in there I saw this man by the trees that is all I know about it.

612 Q. You are not able to tell just where the train was with respect to the curve when you saw the man? A. No, sir.

Q. Had you been there any length of time before you saw Rocco? A. Not very long, just stepped in.

Q. When you stepped in there very soon after

that you saw Rocco's head on the track? A. I saw him through the bushes on the track. I saw him through that clump of bushes on the right hand side. 613

Q. Can you tell me how far away the engine was from where he was? A. I am not a good judge. I judge 200 feet or more.

Q. And what occurred, tell the jury what you saw and what occurred? A. Well, I saw this gentleman through the trees, this Rocco, and he was facing us and he seemed to stand there for a fraction of a second it seemed to me and I thought he would get off the track as we come around the curve. The engineer, Mr. Silke, pulled some brake and I stepped back in there and thought we were going to hit the car and I was certain we weren't going to hit the gentleman. 614

Q. Where was he? A. He was standing on the left hand side of the track.

Q. Your left hand as you face him? A. Coming into Ithaca.

Q. He was standing on the outside of the east rail? A. I would say he was outside of that rail; he was to the left.

Q. You were under the impression that he wasn't going to be hit? A. Very much so.

Q. From the time you saw Rocco do you know anything about the speed of the train? A. Ordinarily? 615

Q. No, that day? A. No, I don't. Do you mean at that particular time?

Q. Yes, when you first saw Rocco through the bushes? A. I think at that time he had cut it down a little.

616 Q. Do you know how fast he was going? A. He wasn't going much over twenty-five miles an hour. I drive an automobile and I gauge it by that.

Q. Did you hear anything of the whistles? A. I don't remember anything about whistles.

Q. Did he ring a bell? A. Absolutely.

Q. But you won't say about the whistle? A. No, sir, I won't say about the whistle.

Q. How soon after you saw Rocco will you say that you felt the brakes applied? A. After we got around that curve it seemed to me he was tightening up on the brakes and then the brakes went on suddenly. You can tell when they go on suddenly.

617 Q. My point is could you tell from the first time that you saw Rocco through the bushes as to when it was from that time that you felt the brakes go on? A. Right around there where he came in full view.

Q. How far was he from Rocco when you felt the brakes go on? A. That would be a conjecture, 100 feet or something like that.

Q. You say you stepped back in your compartment and didn't see the accident? A. I opened my door up ready to jump in case of accident.

618 Q. Did you this time? A. Yes, sir.

Q. You didn't see the contact, the impact? A. No, sir.

Q. Where did the train come to a stop? A. Where the coaches were was on the track. I know it was because there was an automobile standing to go by.

Q. Crossing into Stewart Park? A. Yes, sir.

Q. You know where the hotel is? A. Yes, sir.

Q. Was it this crossing north of the Rappuzzi Hotel? A. Yes, sir, it was the crossing north towards Auburn. 619

WILLIAM MORROW, having been called as a witness in behalf of the defendant, in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Morrow, where do you reside? A. Ithaca.

Q. What is your business? A. Baggage man for the Lehigh Valley. 620

Q. Now, on this day that the accident happened to Rocco, where were you? A. In the baggage car.

Q. On the train? A. Yes, sir.

Q. Did you see the accident? A. No, sir, I was inside of the baggage car.

Q. Do you know when they approached the scene of the accident? A. Yes, sir.

Q. Do you know when the accident happened? A. Yes, sir.

Q. Were you in the baggage car all the time? A. Until we stopped. 621

Q. Do you know anything about how fast this train was running when it came to the curve before the accident? A. I judge she did twenty-five miles an hour.

Q. Did you hear any blast of the whistle? A. Yes, sir.

Q. What did you hear? A. The regular crossing whistle.

622

Q. You heard that? A. Yes, sir.

Q. And where was it, where did you commence to hear it? A. Down near the whistling post.

Q. What is the crossing whistle? A. Two long and two short.

Q. Did you hear that? A. I heard the regular blow.

Q. What, two long and two short? A. Yes, sir.

Q. You heard those blasts? A. Yes, sir.

Q. Did you hear anything of the bell? A. Yes, sir.

623

Q. Did you hear that? A. Yes, sir.

Q. Was that ringing? A. Yes, sir.

Q. Do you know anything more about it? A. Nothing.

Q. Did you feel any brakes go on the train? A. I did.

Q. Where? A. I should judge about the time it hit him or hit the car.

Q. Did you look out of your car to see where you were? A. Not until after we stopped.

Q. You don't know exactly where you were when the brakes were put on? A. No, sir.

624

Q. You don't know where he was? A. No, sir.

Q. Afterwards did you go back? A. After we got stopped, yes, sir.

Cross-examination by Mr. Heath:

Q. What were you doing in the baggage car as you approached this curve on this day? A. Getting my work finished up going into Ithaca. I always do.

Q. Just what was your work then when you were going into this curve? A. Tieing up my mail and getting ready to finish the trip. 625

Q. Do you know whether the whistles blew down at the crossing north of the salt company? A. Yes, sir.

Q. But you were doing your work there? A. Yes, sir, perhaps.

Q. Do you know whether they blew at all the crossings between Auburn and the salt company? A. I couldn't say whether they blew at all of them.

Q. Have you in mind those between McKinneys and the Salt Block? A. Yes, sir, I have because they blow all the time up through them crossings. 626

Q. On this day in question? A. Yes, sir.

Q. You were doing your work? A. Yes, sir.

Q. Were you looking out the window? A. No.

Q. As you travel along there doing your work, tieing up the mail, sorting it, whatever it was, you had nothing in your mind where you were at the point of the track? A. After we left McKinneys he blew right through.

Q. As you were riding along in that train doing your work you weren't looking out the window? A. No, sir.

Q. Your mind was on the work? A. Yes, sir. 627

Q. Your mind wasn't on the train whistles? A. Not particularly, no sir.

Q. You say you think the application of the brakes and the impact—you heard the crash? A. Yes, sir.

Q. The application of the brakes and the crash

628 came about the same time? A. I judge so, yes.

Q. You made a statement to Mr. Douglass, the claim agent, shortly after this accident and signed it? A. Yes, sir.

Q. Saying that the whistle blew at this whistling post, did you? A. Yes, sir.

Q. Mr. Morrow, where was the body, where did the body lay? A. What I saw was the head.

Q. Where was that? A. In the middle of the track.

Q. Did you see any of the rest of the body? A. No, sir.

629 Q. Did you go right back? A. I did after we stopped.

Q. And who was there? A. I don't remember anyone there. The express messenger and I went back together. I didn't see a soul there at all.

Q. How long were you there? A. Not over five or ten minutes.

Q. You were there five or ten minutes? A. Perhaps five.

Q. No one came there? A. No, sir.

Q. Then what did you do? A. Went back to the train.

Q. You went on back into Ithaca? A. Yes, sir.

630 Q. Did Mr. Carrigan come by there? A. Yes, sir.

Q. Then there was the express messenger, Mr. Carrigan and you who went back? A. He went back after we did.

Q. How long did you stand there before the train went back in to Ithaca? A. Not a great while.

Q. Did you see the body? A. No, sir, all I saw was his head. 691

Q. Did you look for it? A. No, I saw enough.

Q. Did Silke go back at all? A. No, sir.

THOMAS CARRIGAN, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Carrigan, what is your business? A. Passenger train conductor. 692

Q. For the Lehigh Valley Railroad Company? A. Yes, sir.

Q. How long have you been? A. Fifty-two years.

Q. Where have you been traveling all that time? A. Cayuga Lake, between Ithaca and Auburn, North Fair Haven, Sayre and Geneva.

Q. How long Auburn to Ithaca? A. This run from 1910, 13th of July.

Q. Were you on this train No. 302 the day of the accident to Rocco? A. Yes, sir.

Q. Acting as conductor? A. Yes, sir. 693

Q. Where were you? A. Rear end of the coach.

Q. Do you know what you were doing? A. I wasn't doing anything; my work was all done, I was sitting down.

Q. Do you know as you sit there now when the train went past the Salt Block, do you recall having passed the Salt Block? A. Yes, sir.

634 Q. Do you know where the whistling post is there along the line before you get into the curve? A. Yes, sir.

Q. Can you tell by this map that that (indicating) is the Salt Block? A. The Salt Block is there (indicating).

Q. Then coming south towards Ithaca you would come to the curve? A. Yes, sir.

Q. And then come to the crossing at Rappuzzi's hotel? A. Yes, sir.

Q. Did you hear the whistle? A. Yes, sir, at the whistling post.

635 Q. Whistling for this crossing going into Stewart Park? A. Yes, sir.

Q. What was it? A. Two long and two short.

Q. Did you hear anything of the bell? A. I couldn't say positively whether I heard the bell but the bell is always ringing there all the time.

Q. It is an automatic bell? A. Yes, sir.

Q. And always through that part it is ringing? A. Yes, sir.

Q. Do you know how fast the train was going into the curve? A. About when he whistled twenty-five to thirty miles an hour.

636 Q. Where did the train stop? A. Rear crossing at Rappuzzi's going into the north of the hotel.

Q. Did you get off the train after it stopped? A. Yes, sir.

Q. And then you went back? A. Yes, sir. Not until after I told the engineer to get off the crossing and let a party into the park and then I went back.

Cross-examination by Mr. Heath:

637 Q. Tom, did you take a list of the names of the passengers on the train? A. Well, I couldn't say that I did. It is customary to take them but I don't think I had many.

Q. Did you have any? A. I had some.

Q. Did you take the names? A. We are supposed to poll the train and do.

Q. You poll the names? A. Yes, sir.

Q. Did you ask them whether they heard the signals? A. I always ask the questions.

Q. You made that report and sent it in to your superior? A. To my superior.

638 Q. You went back, did you, to where the body lay? A. Yes, sir.

Q. Where was it? A. The body was just a little ways from where it was struck and just a little to the east. I might say it wasn't moved.

Q. It was in the center of the track? A. When the body was struck it fell over lengthwise in the track.

Q. In the center? A. Yes, sir.

Q. As a matter of fact the limbs were cut off?

By Mr. Cobb: Objected to as incompetent, improper and immaterial.

By the Court: Objection overruled. 639

By Mr. Cobb: Exception taken for the defendant.

A. Yes, sir.

Q. And the head, is that right? A. Yes, sir.

Q. And the body lay in the center between the rails of the track? A. Yes, sir.

Q. Inside? A. Yes, sir.

640 Q. Did you notice where the speeder was? A. No, I don't know but to my recollection it wasn't far from the body.

Q. Did you see the skull, the head?

By Mr. Cobb: Objected to as incompetent.

By the Court: Objection overruled.

By Mr. Cobb: Exception taken for the defendant.

A. I just saw the remains just as they lay there.

Q. Did you see particularly the head? A. Not more than the body.

641 Q. As a matter of fact the head went off to the side and was picked up a day or two afterwards? A. The body was from the head and the head from the body.

Q. Did you see the head? A. Saw it all lying together.

Q. You say the head was between the rails? A. I won't say where I saw it but the body was between the rails.

Q. Did you send Mr. Stevens back to flag the freight? A. I did not.

Q. Who did? A. I don't know.

642 Q. Did you send anyone back? A. I saw a man there and I think it is the man I see here in the chair yesterday and I asked him if he lived there and he said yes. I asked him if he had a phone and he said yes and I asked him if he would be kind enough to telephone to the Salt Works not to let the freight go by, that we had an accident and he said he would do it.

Q. Did you call up the sheriff? A. No, I asked him to do the calling on the phone, to call the doctor and all parties concerned. 643

Redirect examination by Mr. Cobb:

Q. Mr. Carrigan, how many passengers did you have on the train? A. I couldn't say now. They have a tally of them in the office.

Q. Did you have any? A. Sure, I have some every day.

Q. Did you have any pay passengers? A. Yes, sir, deadheads we don't count.

Q. Did you have any deadheads? A. No, sir. 644

Q. Did you have any passengers that you can tell me the names of? A. No, sir, we have to send in the names and I don't have the record.

Q. Do you know that you had one passenger at that point? A. I am swearing, I tell it as I know it.

Q. At the time of the accident you don't know whether you had one passenger on that car? A. Possibly we did but I wouldn't say.

Recross examination by Mr. Heath:

Q. But you did send in a list of the people on that train? A. I have to, yes, sir.

Q. And you did? A. Yes, sir. 645

Q. And this company has it as far as you know? A. I sent it in.

Q. In writing? A. Yes, sir.

646 *Redirect examination* by Mr. Cobb:

Q. You made a report of the accident? A. Yes, sir, I made a report when I reached Ithaca.

Q. That is what you sent in? A. Yes, sir.

Q. Now do you know whether there were any passengers named in that report? A. That is a different report from the accident. We have to poll the train.

Q. Did you send in a second report as to polling the passengers? A. Yes, sir.

647 Q. There must have been some on there? A. Whatever report I sent in; if no passengers I would send the report no.

Q. Anyway you had to make a report? A. Yes, sir.

Q. And you did do it? A. Yes, sir.

Recross examination by Mr. Heath:

Q. If there were no passengers on there, you would pretty near recall that? A. I don't know.

Q. That would be an unusual thing? A. Yes, sir, at times we don't have anyone.

648 Q. As you sit there and do your best to recall, you would say you didn't or did have passengers? A. My best recollection is that I had.

Q. And whatever the record is of this day as you say, you sent it in? A. I sent it in. I don't know who has it, Mr. Heath.

Redirect examination by Mr. Cobb:

Q. Do you know what time it was when this ac-

cident happened? A. It was between three and half-past three, Mr. Cobb. 649

Q. It wasn't beyond 3:30? A. It was between 3:00 and 3:30.

Q. It wasn't 3:30? A. I judge it wasn't.

Q. Did you look at your watch before you left there any time after the accident? A. I looked at my watch when we first got there.

Q. What time was it? A. It was between 3:00 and 3:30. I wouldn't say the minutes. It is on my report there what time it happened.

Q. You looked at your watch after you got there? A. Yes, sir.

Q. You say it was between 3:00 and 3:30? A. 650 Yes, sir.

Q. It wasn't later than that? A. No.

Recross examination by Mr. Heath:

Q. Where is your report? A. I haven't it; I don't hold it.

Q. What time did you leave Ludlowville? A. 3:16.

Q. 3:14, wasn't it? A. Yes, sir.

Q. You came on from Ludlowville and stopped at Portland Point and passed the freight there? A. Backed in out of the way and let the freight back down. 651

Q. Have you looked at your record since you made it? A. No, sir.

Q. Do you swear positively, unqualified, that it wasn't after 3:30? A. It couldn't have been.

Q. Do you swear it of your own recollection that it wasn't after 3:30? A. I wouldn't swear to that.

652 I am under oath and have got to tell the truth as near as I can.

Redirect examination by Mr. Cobb:

Q. You told me that the accident happened between 3:00 and 3:30? A. To the best of my knowledge.

Q. That you looked at your watch after you got there? A. I don't know whether I told you that.

Q. You told me the accident happened between 3:00 and 3:30? A. Yes, sir, I did.

Q. Now do you say that isn't right? A. No, I 653 don't.

HERBERT VAN ETTEN, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

Q. Mr. Van Etten, where do you live? A. Ithaca.

Q. What is your business? A. Work for the American Railway Express, express messenger.

654 Q. Did you work for the American Railway Express at the time of this accident? A. Yes, sir.

Q. Were you an express messenger on this train? A. Yes, sir.

Q. Where were you when the accident happened? A. Alongside of the baggage car.

Q. Now do you recall before the accident and at

the time when the train passed the Remington Salt Block? A. Yes, sir. 655

Q. After that did you hear any whistles before you got to the accident? A. I did.

Q. What did you hear? A. I am not familiar with the general rules of the whistle but I heard him blow.

Q. Did you feel the brakes go on the train before the accident? A. I did.

Q. Could you tell whether they were an emergency or a service application? A. Yes, sir, you could tell because the train slows down much quicker when the emergency is applied.

Q. What do you say, which was applied? A. 656
The emergency.

Q. You didn't see the accident? A. No, sir.

Q. You were in the car? A. In the car with Mr. Morrow.

Q. After the accident did you go back, after the train stopped did you go back? A. Yes, sir.

Cross-examination by Mr. Heath:

Q. When did you make the statement to Mr. Douglass? A. Shortly, a few days after the accident.

Q. Was Mr. Morrow present? A. No, sir.

Q. Where were you? A. In Mr. Douglass's office. 657

Q. At Auburn? A. Yes, sir.

Q. And you went there to make the statement? A. He sent for me.

Q. And when he sent for you, you went in? A. Yes, sir.

Q. And in that statement you said that this train
658 blew the whistle down there just before the accident as it came into the curve? A. Yes, sir.

Q. What were you doing? A. Sat there on my safe finishing up my work.

Q. And your mind was on the work? A. Yes, sir.

FRED NICHOLS, having been called as a witness in behalf of the defendant in the above entitled action, after being first duly sworn, testified as follows:

Examined by Mr. Cobb:

659 Q. Mr. Nichols, where do you live? A. Ludlowville.

Q. What is your business? A. Section foreman.

Q. What is your section? A. No. 24.

Q. Where does it extend? A. Rock Salt north to Lake Ridge.

Q. And that is on the Auburn branch of the Lehigh Valley? A. Yes, sir.

Q. Do you remember the date of this accident, December 8th, 1927? A. Yes, sir.

Q. Where were you? A. On the work train.

Q. Where was that? A. West of Kings Ferry.

660 Q. Were you there with your gang? A. Yes, sir.

Q. Who was the track walker under you in that section? A. Henry Townley.

Q. Prior to this accident for some years did you know anything about any instructions given to you or you gave to your track walker as to calling up to see about trains before the speeder was put on the

track? A. Yes, sir. 661

Q. Who did you get that from? A. Mr. Pierce.

Q. Mr. Ernest Pierce? A. Yes, sir.

Q. Was he your superior? A. Yes, sir.

Q. Did you communicate that to your track walker?

By Mr. Heath: Objected to as incompetent, improper and immaterial.

By the Court: Objection sustained.

By Mr. Cobb: Exception taken for the defendant.

Defendant rests.

Plaintiff rests. 662

Evidence closed.

By Mr. Cobb: Defendant at the close of the evidence desires to renew its motion made at the close of the plaintiff's case and for a directed verdict in favor of the defendant against the plaintiff upon all the grounds at that time stated and upon the further grounds now that it appears that this accident was not caused in whole or in part from the negligence of any of the employees of the defendant with the exception of Rocco himself, and that it conclusively appears now that Rocco in putting his speeder upon the tracks that afternoon of December 8, 1927, did so in violation of his duty and instructions, and that he cannot be heard now to complain after he violated his duty and he assumed any risk from that time on up to this accident as a matter of law and he cannot recover. 663

664 By the Court: Motion denied.

By Mr. Cobb: Exception taken for the defendant.

CHARGE TO THE JURY.

Gentlemen of the Jury: This is an action wherein Mary Rocco, as administratrix or rather as executrix of the will of Joseph Rocco, deceased, seeks to recover damages against the defendant, the Lehigh Valley Railroad Company, by reason of the death of Joseph Rocco in an accident which occurred on December 8th, 1927, while the deceased Rocco was
665 working for the defendant railroad company, and it is claimed on the part of the plaintiff that the accident was due to the negligence of the defendant railroad company. This action comes under a law known as the Federal Employees Liability Act. I refer to that because the rules of law in some respects differ from the rules of law in negligence actions brought under the laws of the State of New York. This is the law of Congress, a federal law, and although we are governed by federal laws as to the question of liability, yet the action, under another statute, is permitted to be brought in the state courts
666 but we have to administer that law as though it were a federal court as far as the rights and liabilities, following of course the practice of state courts in the matter of mere procedure.

I believe it is not disputed that the deceased was engaged in work which was in interstate commerce, and this action does come under the federal em-

ployees liability act and the rules applicable thereto. At any rate Rocco was working on a railroad of the defendant and it is conceded that its tracks and the railroad was engaged in both interstate and state commerce, that is traffic within the state and traffic between the states, known as interstate traffic. He was working upon those tracks and while I believe it is conceded, I would hold as a matter of law that he was working in interstate traffic for the defendant, that is engaged in interstate work because he was working on those tracks inspecting them and doing some minor repairs as they might be suggested, but his work being particularly that of inspection. 667

It is claimed by the plaintiff and on the plaintiff's behalf that on the day in question Mr. Rocco, the deceased, went out on his usual work, being supplied by the defendant company with a kind of handcar, three-wheel self-propelled vehicle known as a speeder. When I say self-propelled I mean propelled by hand or human power, propelled by his hands and his feet and not by a motor of any kind. There is no dispute about the kind of a car he was equipped with to go about his duties and his duties were on what is known as the Auburn-Ithaca branch of the Lehigh Valley Railroad Company, and his work was out from Ithaca northerly to a point that has been designated but the name of which doesn't now occur to me. There is no dispute that he was on the part of the defendant's road which was assigned to him for his work. It is claimed on the part of the plaintiff that as he was about his customary duties he came to a curve which is near what is called the 668 669

Stewart Park entrance and just northerly of a high-
670 way or roadway crossing which leads to that park and that he was proceeding northerly on his work of inspection and that he came to a curve which bends to the easterly and then back again to the westerly, conforming to the shape of the lake along which the track runs, and that at that point it was impossible to see only a limited distance from where he was running. In other words, that it was impossible to see the length of that curve, and it is claimed that at a point opposite the premises or nearly opposite the premises of a Mr. Stevens, a train of the defendant's suddenly came upon the deceased and the accident
671 occurred which took his life. It was claimed by the one eye witness sworn by the plaintiff, as I recall his version, that the deceased was on the car at the time when the accident happened. This witness, Mr. Stevens, has told you how he happened to be at the location. It seems he gathers specimens for zoological, biological or entomological research and sells those natural specimens to those people and that he was out in the work of gathering such specimens and that he was going northerly on this track and that the deceased was going in the same direction a little faster than he was going, and he has testified that he
672 heard no whistle. He was cross-examined at considerable length about that but he insists that he heard no whistle unless it was just immediately previous to the accident, that is at about the instant of the accident. He claims that he heard no whistle or other sound from the train which caused the accident coming from beyond the curve or in the vicinity of the whistling post or the salt works, which have been

named. While he didn't testify positively on cross-examination that no whistle was blown, he has testified that he heard none and that his hearing was very good and that the wind was from the northwest and that it was a strong wind, and it is claimed by the plaintiff that that amounts to admission by Mr. Stevens that the whistle didn't blow at all. 673

Now, it is claimed on behalf of the defendant that the executrix of Mr. Joseph Rocco isn't entitled to recover in this action on the ground first that it is claimed that Mr. Rocco went upon this curve, in fact upon this track, in violation of his orders; that there was a rule of the company, although not printed, which forbade him from going on the track until he had called up the operator or train dispatcher, who would call up the telegraph operator and ascertain where the trains were located, so that he might be governed accordingly for his own safety and the safety of the property of the company. It is claimed by the defendant there was such a rule, although not printed, and it is claimed that he violated that rule and the defendant claims that that violation not only constituted contributory negligence but it is claimed that that act and that violation of such rule was such that the deceased was chargeable with having been killed entirely from his own negligence. In other words that he took his own risk when he went onto the track as he did and that he assumed his own risk and that he was killed through his own fault alone. 674 675

The plaintiff claims, in addition to what I have stated, that it was the duty of the defendant on approaching curves and especially a curve such as the

676 one on which the accident took place, to give a warning of the approach of its train to this curve. A rule was introduced, in fact of the company requiring trains to blow a whistle with intensity proportionate to the distance the sound was to be carried and to prolong that to the distance to which it was to be carried. However, the defendant has produced witnesses, two, I believe, anyway two, who testified that that rule does not apply on a single track road, calling attention to the fact that this rule is printed in heavy face type, that is that provision about blowing the whistle on approaching curves and places on the track where workmen are likely to be engaged, and 677 that therefore it didn't apply to single tracks. The witnesses who swore to that were not contradicted. While I don't charge you as a positive proposition of law that you must believe the testimony of those witnesses who have sworn that the heavy face type rules apply only to double track roads, but it is a rule of law where witnesses are interrogated and there are no circumstances which contradict any inherent part in their stories, that such testimony is to be given credence. However that may be, the plaintiff claims that due diligence required the railroad company, that is the engineer of that train who, for the pur- 678 pose of the argument, is the railroad company, required the engineer of that train to blow his whistle on approaching a curve where it is impossible to see what is ahead and where it is not possible for him to see whether anyone is on that track. It is claimed on behalf of the plaintiff that due diligence would require the blowing of a whistle independent of the

fact whether the rule, which was offered in evidence, has any application to this case or not and that the failure to blow that whistle wasn't diligence but was an act of negligence for which the defendant is liable. 679

The defendant answers that proposition by some evidence and by making the claim that although not admitting liability or an obligation to blow a whistle at that point, this defendant denies that it owed to the deceased any obligation to blow the whistle on account of the rule to which I have made reference; still they say they did blow the whistle because there was a whistling point at a sufficient distance northerly from this curve to be ample and sufficient as a warning to the defendant although that whistle wasn't blown out of any recognized duty to the deceased, but as a duty which it owed to the public on account of blowing for crossings. Railroad companies must give some signal of approach of their trains to highway crossings, and it is claimed in recognition of that duty they did blow the whistle. They denied any obligation to the defendant for the reasons to which I will refer more fully later, but they say they did blow the whistle and that whistle, if there is any obligation on their part to blow the whistle and if they did, owed no such duty to the deceased, and that that whistle, although blown for the benefit of the public using the crossings, answered all practical purposes as far as whistling for this curve is concerned and discharged any obligation which there might be, although they denied any obligation to the deceased. They claim that they did blow their whistle as a fact. 680 681

682 On behalf of the defense they claim first that they did blow that whistle and that that was sufficient warning to deceased, if any was needed, and answered all practical purposes if it should be held that they were under any obligation to blow that whistle and they claim that in addition to claiming as they do under that alleged unwritten rule, which they claim was duly promulgated and which their supervisor of tracks as testified was made a rule and handed down to subordinates and which several witnesses have sworn was stated to the deceased to be a rule. In other words it is claimed by witnesses for the defense that it was a rule although not 683 printed in the book that a track inspector such as the deceased, before going on the track, should go to the office and call up the operator and have him ascertain the location of trains and that the individual here should find out for himself the location of trains before going out upon the tracks.

It is claimed by the defendant that they had that measure for the protection of the track men as well as for the protection of others. Now while there are no witnesses who have contradicted any rules or any terms, the testimony of those witnesses who have sworn to the existence of such a rule and who 684 have sworn that that rule was communicated to the deceased, still the fact of the existence of such a rule is attacked by the plaintiff and on behalf of the plaintiff. It is claimed on behalf of the plaintiff that it should not be held to be established that there was such a rule notwithstanding that the plaintiff was unable to call any witnesses to con-

tradict those witnesses who have testified to the existence of such a rule. They claim first that the witnesses who so testified are employees of the defendant and in that way have an inherent interest in the result of the accident. They claim that the fact that they are employees of the defendant should be taken into consideration in deciding whether you will believe that testimony. It is claimed too that the fact that the company had a book of printed rules, quite an elaborate book of printed rules, the fact that this rule was not printed should be taken into consideration in determining whether there was such a rule. It could not be claimed that a rule must be printed and I charge you as a matter of law that if there was such a rule, it was just as valid as though printed if it actually existed and was brought to the attention of the deceased. But I want to call your attention to what is claimed as one of the things you may take into account but not conclusive nor am I expressing an opinion one way or another but you may consider that fact for what it is worth. It is also claimed by the plaintiff and on behalf of the plaintiff that such a rule, if it did exist in a measure that it wasn't a positive and ~~in-~~ infallible rule and that in the very nature of things it could not be infallible, in short it is claimed it could not always be practicable under all circumstances for the deceased to ascertain the location of trains in the manner prescribed by the alleged rule and it is claimed on behalf of the plaintiff that on the day in question when the deceased went on the track that such a situation existed by reason of the

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688 train being very late and on account of the washout, it is claimed that while he might have ascertained something, he might have ascertained the last station they were at, he couldn't have ascertained with exactness where that train was and it is claimed on the part of the plaintiff that the condition of the track on that morning or on that day in question on account of there having been several wash-outs and trains being delayed on account of the wash-outs, it being conceded that the train in question which killed the deceased was several hours late on the morning or afternoon of the accident, whatever it was, it is claimed on the part of the plaintiff that 689 the deceased was justified in going out on the track and would not have been justified in remaining idle until he learned the exact location of the train.

Now, in calling your attention to what the plaintiff claims about this rule and its binding force and whether it was unvarying or not or whether it was ~~infallible~~ inflexible or not, I want you to understand, gentlemen, that I am not expressing any opinion of my own; I am only saying you may take into consideration all the circumstances in determining whether there was actually such a rule. If there was such a rule and if that rule was ~~infallible~~ inflexible as claimed by the 690 defense and if it is true that several times previously the deceased had been rebuked for violating that rule, at any rate if it is true there was such a rule and that was ~~infallible~~ inflexible and was understood by the deceased, if he went on the track in deliberate violation of that rule, then you have a right to say, if you so believe, I am not saying it was so, from those

facts, that he took his own risk and that the negligence which caused his death was altogether his own. But if that rule didn't exist or if it was only ~~occasionally~~ general or if it was sometimes ~~fallible~~ flexible, being only a direction for his general conduct, in other words precautionary to regulate his general conduct and if the situation of the highway on that morning justified him in going upon the track, why then you may ask yourself the question whether he was guilty of negligence in going on the track. If you determine that he didn't assume the risk fully you may still consider whether he was guilty of negligence which contributed towards the happening of the accident, because the contributory negligence under this Federal Employees Liability Act is a different proposition than the assumption of risk. Ordinarily the assumption of risk means that the employee assumed those risks which are apparent or which are known to him to be inherent in the work, it is that they necessarily accompany and are a part of the work. If he knows those things or in the exercise of reasonable intelligence ought to have known it, then he assumes the risk but the assumption of risk only applies to those things ordinarily which are inherent in the work to be done and that are either known to the employee or he being charged with knowledge of it.

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Now, if we assume, and it is for you to say whether you will assume that or not, then the rules that I have endeavored to explain to you, if you assume that Mr. Rocco was justified in starting out on this track with his speeder as he did on the

694 day in question and he was justified in going out onto that curve with his speeder, even though it may have been negligence for him to do so but if you assume that he wasn't assuming of the entire risk for him but just negligent, then you come to the question whether the defendant was negligent. Now, I don't charge you that it was or wasn't the duty of the defendant to give notice from its train, the one that killed Mr. Rocco, of the approach of that train to the curve in question. I do charge you that it is for you to say whether it was the exercise of reasonable, ordinary diligence to not blow a whistle on the approach of that crossing or whether the ex-
695 ercise of ordinary diligence didn't make such blowing necessary.

Now, the law requires of everyone who is engaged in any pursuit which brings them into contact with the person or property of another to use due diligence for the safety of those others and that property. Ordinary diligence is the doing of that which a reasonable, prudent person would do under the circumstances and negligence is the failure to do that which a reasonable prudent person would do under the circumstances. If the engineer of the train, as he approached this curve had rea-
696 son to believe that there might be workmen upon that curve, whom he couldn't see, and he might be injured by his train, it was his duty to give reasonable notice. The law doesn't say whether by whistle or otherwise but to give some reasonable, audible notice of the approach of that train to that curve. If in the exercise of a reasonable prudent inference

he didn't have reason to believe that there might be danger to men upon that track, then he would not be obliged to give the signal. It is for you to say, gentlemen, if you find that he gave a sufficient notice of his approach to that curve, why that is the end of the case. You cannot find against the defendant unless you find that they didn't give notice of their approach to that curve. If you find, as the defendant claims, that the notice that they did give, although not given for the express benefit of the deceased, was still sufficient to apprize him of the approach of the train, why then that is the end of the case but if they didn't give such notice and the deceased was justified in being upon the track under the circumstances which have been detailed, then you are to ask yourselves whether ordinary diligence wouldn't have required the blowing of that whistle or the giving of some kind of a signal of the approach of that train to workmen and persons lawfully upon the track of the coming of the train. That is the question which you must ask yourselves. You must ask yourselves two questions: First, was the plaintiff, that is the plaintiff's testator, justified under the circumstances and within the rules that have been mentioned in going upon this track and upon this curve at the time when he did and if he was justified, you will ask yourselves the question whether any warning was given by the engineer of the approach of that train to this curve. If in the exercise of ordinary prudence he had reason to believe that he would injure persons lawfully upon the track and there might be persons lawfully upon the

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700 track, then it was his duty to use ordinary diligence to give warning of the approach of his train to this curve by such means as reasonable diligence would make available and it is for you to say whether they did that or not.

This case is different than the ordinary negligence case and calls for a much finer ~~demarkation~~ discrimination on the part of courts and jury than the ordinary negligence case.

Now there are some rules in a negligence case that apply to this case as well; there are some general rules that appiy to all, rules that apply to these as well. The plaintiff in a negigence case, before he 701 can recover must satisfy the jury by a fair preponderance of evidence that the accident of which he complains was due to the negligence of the defendant either in whole or in part. When I say in part I mean that he must prove it was due to the negligence of the defendant to such an extent that without that negligence the accident complained of would not have occurred. In order to fully recover in the action he must also satisfy you that he was free from any negligence which contributed towards the accident. If this action was under the state laws, it would be incumbent upon the plaintiff to 702 satisfy you or establish within the rules of law that he was entirely free from negligence before he can recover but under the federal statutes and in a case like this the rule is different. If the accident was caused in part by the negligence of the plaintiff and in part by the negligence of the defendant in a case like this under the Federal Employees Liability Act,

the defendant is still liable for the proportion of the damages to which the plaintiff would otherwise be entitled to corresponding to the proportion of the plaintiff's contribution to the accident. In other words, I may make that more clear. If you find that Joseph Rocco was killed partly due to his own negligence and partly due to the negligence of the defendant and you find that it was fifty per cent due to his own negligence and fifty per cent due to the negligence of the defendant, then the plaintiff would be entitled to recover one-half of the damages arising from his death. If you should say that the negligence of Joseph Rocco contributed to the accident was one-fourth or 25% and the negligence of the defendant three-fourths or 75%, then you would assess against the defendant 75% of the plaintiff's damages. To make it still more clear, suppose we will take a smaller sum but suppose the plaintiff's damages was just $1.00, arising from the accident was $1.00, and one-half was due to Rocco's negligence and one-half due to the defendant's negligence, the verdict would be for fifty cents; if it was one-fourth due to Rocco's negligence and three-fourths due to the defendants' negligence, the verdict would be seventy-five cents; if it was thirty per cent due to the negligence of the defendant and 70% due to the negligence of Rocco, the verdict would be thirty cents. Now, if you reach that question, that is the way you will arrive at your verdict.

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Now to resume. As to the defendant's negligence the plaintiff has the burden of proof and must satisfy you by a fair preponderance of evidence that

the defendant was negligent. By that is meant that
706 the plaintiff must satisfy you by evidence which to some appreciable extent outweighs and overcomes that given on behalf of the defendant that the defendant was negligent and liable for the negligence within the rules you have heard. As to that, as to the defendant's negligence the plaintiff has the burden of proof so that if the proofs were evenly balanced or practically evenly balanced the plaintiff must fail but on the question of contributory negligence in case of accident resulting in death the rule is opposite. If Rocco was alive he would also have the burden of showing that he did not contribute at
707 all to the accident and he would have the burden of proof on contributory negligence. He would have the burden of proof on both propositions but in case of the representative of deceased's suit the rule is reversed so on the question of whether Rocco was guilty of contributory negligence the burden of proof is on the defendant and that is also true on the question of whether Rocco violated an express rule of the company and upon that the burden of proof is on the defendant to show the contributory negligence or negligence in any degree of the plaintiff. If the accident was due wholly to the negli-
708 gence of the plaintiff your verdict must be no cause of action. If it was due to the negligence of anybody else or at least if it wasn't due to the negligence of the defendant, your verdict must be no cause of action. But if it was due wholly to the negligence of the defendant, your verdict must be such a sum as you appraise the plaintiff's damages

to be but if it was due partly to the negligence of one and partly to the negligence of the other, then you will apportion the damages or assess the damages on the basis which I have already indicated. 709

Now, in order that the Court may correctly appraise your verdict when you have found it, I am going to direct you to answer certain questions instead of finding a general verdict. In other words what is known as a special verdict. First, I am going to ask you to say whether you find for the plaintiff. If your answer to that is no, you needn't go any further. If it is yes, then I am going to ask you to say whether in your opinion the accident was due partly to the negligence of the plaintiff as well as to the negligence of the defendant. And if your answer to that is yes I am going to ask you to find first a sum representing the plaintiff's total damages and second, how much they should be reduced on account of the negligence of the plaintiff and thus at the end, if you do find for the plaintiff, you will say we find for the plaintiff in the sum of so many dollars, being the difference between the amount of the total damages and the amount which you hold the plaintiff should have the verdict reduced on account of the plaintiff's own negligence, if you find that. I am going, however, to put that in the form of questions so that the Court may correctly appraise the kind of verdict you ~~appraise~~ have found when you bring it in. 710 711

Now, gentlemen, nothing that I have said is to be taken as any intimation on my part as to what I think should be your decision. If I have dwelt

712 longer on what is claimed by one side than the other or if I have dwelt with greater emphasis or if from anything I have said in tone of voice or in expression you think you have read or you think you have been able to surmise what my opinion is I charge you that it is your duty to disregard that. You are not to look to the Court for any intimation what the Court thinks about the matter in dispute, that is entirely for you. That is a wise provision of the law, that questions of fact which are in dispute growing out of transactions like this can be better decided by twelve men in their composite capacity, 713 they being drawn from the various occupations and walks of life, than it should be decided by any one man although that one man may have had some training in weighing and passing on evidence.

The fact that the defendant is a corporation should not be considered one way or another. The plaintiff has not asked you to so consider, but you should not at any rate take that into consideration at all. You are to decide this case just as though it was a case between two individuals, just as you would as if the engineer of that train was being sued instead of the company of which he is an employee because 714 the company, if it is liable for any negligence at all, it would be the negligence of that engineer, if there was any, and this company is entitled to be considered in the same light as though the engineer had been sued. If he would be liable in case he had been running the train as an independent operator and on his own account, then the company is liable, otherwise not. Of course I should not be misunderstood

there. I am not saying that he would be liable in this case if he had been sued because he was working under the defendant, but I am only saying if the company is liable it would be due to the negligence, if any, of the engineer, and you are to weigh the evidence in this case on that idea. 715

Now, then, if you find for the plaintiff, you must arrive at a total amount of damages. In other words, whether you find wholly for the plaintiff or in part on account of any contributory negligence on the part of the deceased, you must still appraise first what are the whole of the plaintiff's damages. No ~~material fact~~ formula can be given to direct you but there are some things you may take into consideration. You may take into consideration that the deceased was fifty-eight years of age and that he was earning $112.00 a month. The American experience table places his probability of life at that age at 15.39 years. In other words less than fifteen and one-half years. No one knows how long Rocco would have lived had the accident not happened and he might have died in less than the fifteen years and he may have lived longer; that no one knows. This American experience table is based upon averages and is made up from statistics that have been gathered through quite a period of time, and the law merely takes judicial notice of the fact that at a certain age the average duration of life is thus and so. Of course that varies with individuals. You may take into account the condition of heatlh of the deceased and of the fact that he had dependents. You have a right to take into account and you are to say what in 716 717

718 your opinion, based upon this probability of life and based upon his condition of health and upon his earnings, what he would have probably been worth to his family if he had lived. In other words, he was what is commonly known as the breadwinner of the family and you are to assess in money only what that would have been worth. You have no right to consider the sorrow or grief of the family. You have no right to take into account the fact that it was a great blow to their affections. For the injury to their affections and the severing of the family ties, except in the funeral expenses, you have no right to award damages. The reason for that is it would be impossible. 719 Members of the family value the lives of their families more than anyone and because that cannot be compensated that is why the law does not permit you to attempt it. You cannot ask yourself the question what would you take for a son or husband who was killed. To ask that would tend to lead you into a wrong measure of damages. You are only to consider what the life of Joseph Rocco wa worth as a money earning factor, that and nothing more. What he would have been worth in money to his family if he had lived, taking into account his present and possible earnings, the probability of what he might have 720 earned in the future and his probability of life, and then having done that you will find your verdict accordingly.

In all that I have said about damages don't get the idea that I am intimating that there should be any damages, for that is all on the assumption that you have found the plaintiff is entitled to some damages.

So you will take the case and render such a verdict that in your opinion is fair and just. 721

I have formulated the following questions, which you will answer:

1. Was the accident in question due in whole or in part to the negligence of the defendant?

2. Did the plaintiff's testator by any negligence of his contribute to the happening of the accident?

3. What are the plaintiff's damages?

4. By what sum, if any, should these damages be reduced on account of the negligence of the plaintiff's testator?

5. What is your verdict?

Note: If the first question is answered in the negative, the second and third and fourth questions need not be answered, but your answer to the fifth question will be no cause of action. Otherwise your answer to the fifth question will be, we find for the plaintiff $ 722

Are there any requests to charge?

By Mr. Cobb: I object to your Honor's framing questions and asking for a special verdict in this case.

As to the first question: if you find that this accident was caused in whole or in part from the negligence of the defendant—you have charged that the only negligence on the part of the defendant could be this engineer. 723

By the Court: If he was negligent, the defendant was.

By Mr. Cobb: The statute states if such injury or death resulted in whole or in part from the negli-

724 gence of any other of the employees of the carrier. I object to the first question as worded.

I except to what your Honor said to the jury that you were going to hold as a matter of law that Rocco was engaged in intestate commerce at the time of this accident.

I except to what your Honor said in that part of your charge in which you referred to rules applying to single track and double track and particularly in that part of your Honor's charge in which you stated, "I don't charge you as a matter of law that the rules apply to double track or to single track," 725 but left it to them to determine whether they applied and all your Honor said upon that subject.

By the Court: If I said anything inadvertently, I wish you would call my attention to it.

By Mr. Cobb: I except to that part of your Honor's charge in which you said "the jury can take into consideration all the circumstances and conditions as to whether or not there was this rule in effect as to his calling up first the operator before placing his speeder on the track and as to whether or not that rule was ~~infallible~~ inflexible and all your Honor said upon that subject.

726 I except to that part of your Honor's charge in which you stated in substance that Rocco assumed only those risks that he knew or ought to have known of and what your Honor said upon that question.

I except to that part of your Honor's charge in which you stated "was the engineer justified in assuming that there was somebody at work on that curve and should he have anticipated and given

warning of the approach of that train" and what your Honor said on that subject. 727

By the Court: What I meant to say was he justified in assuming there was not someone.

By Mr. Cobb: I except to that portion of your Honor's charge in which you stated that if he anticipated or if he in using due diligence determined that there was somebody on the curve or would have been, that it was his duty to blow a whistle before entering that curve to warn workmen of the approach of the train and all your Honor said on that subject.

I except to that part of your Honor's charge in which you stated that there might have been workmen on the curve and that the engineer might have 728 anticipated that they were there and that it was his duty to do so if he did and all that your Honor said on that subject.

I also except to what your Honor said as to whether or not those workmen were lawfully on the track and whether the engineer did give warning after using due diligence and all that your Honor said on that subject.

I except to your Honor leaving any question of the intelligence of defendant's employees to this jury.

I ask your Honor to charge the jury that Rocco didn't call up first before putting his speeder on the 729 track or go to see the operator.

By the Court: I decline to charge that on the ground that I did not go into all the details of the evidence.

By Mr. Cobb: Exception taken for the defendant.

730 I ask your Honor to charge the jury under Rule 823 that employees are further warned that they must not rely on others to notify them of the approach of trains and that both Rocco and the engineer were bound to know that rule.

By the Court: I decline to charge other than I have.

By Mr. Cobb: Exception taken for defendant.

And I ask your Honor to charge the jury that if Joseph Rocco violated his instructions to first ascertain from the operator the location of trains before he put his speeder on the track on the afternoon of the day in question, then the plaintiff cannot hold the 731 defendant liable for this accident resulting in the death of Rocco that followed his disobedience of the instructions.

By the Court: I decline to charge other than I already have on that subject.

By Mr. Cobb: Exception taken for the defendant.

I ask your Honor to charge the jury that if the deceased violated the rule or instructions intended for his benefit and safety and safety of the passengers of the train or property, which violation was the result, the approximate cause of the accident, the plaintiff 732 cannot recover.

By the Court: I decline to charge other than I have.

By Mr. Cobb: Exception taken for the defendant.

Defendant asks that if questions are to be submitted to the jury that a question be formed as to

whether or not there was this rule of calling up the operator and whether it was in effect and whether he failed to do that before putting his speeder on the track and if he did, how they should find on that. And that those questions should be included. 733

By the Court: I decline to so charge.

By Mr. Cobb: Exception taken for the defendant.

By Mr. Heath: In quoting I note the word crossing was used instead of curve. I understood the question to be whether ordinary care and diligence required a warning at this curve. I understood you to say crossing.

By the Court: If I did say crossing I meant curve. 734

By Mr. Cobb: We except to your Honor's leaving it to the jury to determine anything from the circumstances of the rule requiring the deceased to find out about trains before putting his speeder upon the track. That that is a question for your Honor to determine and not for the jury.

By the Court: I will leave it to the jury.

By Mr. Cobb: Exception taken for the defendant.

Defendant excepts further to your Honor's charge wherein you stated the engineer had the right to assume, if he should assume that there were workmen ahead, that if he had reasonable belief he should give them proper warning. 735

By the Court: Gentlemen, the defendant's attorney has asked me to read Rule 823, which I had intended to read to you. It is as follows:

786 "Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time, on any track, in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train."

You are to have that rule in mind in determining whether the deceased was guilty of negligence in going upon the track and the part of the track that he did at the time when he was injured. This is a printed rule and is additional to the rule claimed by the defendant as being in force but not in print, and you are to consider this rule not only in conjunction 737 with whether the deceased was negligent but also in conjunction with the fact whether he was negligent to such an extent that he took his own risk.

By the Court: Plaintiff's attorney also asked me to read from Rule 1088 of the rules of the Lehigh Valley Railroad Company just this verse or sentence.

"Road watchmen must carefully examine the track and roadbed and see that they are in safe condition."

You may also take that into consideration in conjunction with the negligence or violation of duty on the part of Rocco to go upon the track at the time he did and as he did.

738 By Mr. Cobb: Exception taken for the defendant.

OPINION.

SUPREME COURT—TOMPKINS COUNTY

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MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Motion by defendant under Section 549, Civil Practice Act, to set aside verdict of jury for plaintiff.

Appearances—

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For plaintiff, Messrs. Stagg & Heath.
For defendant, Messrs. Cobb & Cobb.

SENN J.

The action was brought under the Federal Liability Act to recover for the death of plaintiff's testator who was killed by one of defendant's trains while employed as a track inspector on defendant's road. His duty was to daily go out on the tracks and ascertain that they were in good condition for trains to pass over them. For this purpose he was furnished with a foot-propelled vehicle called a speeder. At about four o'clock in the afternoon of December 8, 1927, he was struck by a train coming from the north and killed. The train was about three and one-half hours late, having been delayed by landslides and washouts.

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The negligence claimed by the plaintiff, among

742 other things, was that the train was operated carelessly, without due regard for the safety of employees of the railroad on the tracks, in not giving reasonable warning of its approach, considering among other things that it was not running on schedule time.

The defendant insists that no negligence was proven and that the accident was wholly due to the negligence of deceased. That it was his duty, under an order of the company, never to go out on the track on his inspections without first obtaining from the operator at Ithaca a "line up" of the trains on the track patrolled by him, that is, of their location and movements; that he went out on the day in 743 question without having obtained this information which he could have obtained from the operator. It is claimed, citing Unadilla Valley Railroad Co. v. Caldine, 277 U. S. 578, that decedent's violation of his orders was the proximate and sole cause of his death. The Caldine case is familiar in this vicinity. Caldine was conductor of a train on a single track which passed through Bridgewater. He had printed orders not to leave Bridgewater until train No. 15 had reached that station and taking a siding to allow his train to pass. Disregarding this, on the day in 744 question, train No. 15 not having arrived, he directed his train to go on. His train ran into train 15 rightly coming the other way and he was killed. The conductor on train 15 generally, or when a little late at a station about two miles from Bridgewater, would telephone to the Bridgewater station that he was coming. He did so this day. The station agent testified that he told this to the motorman of de-

cedent's train although the motorman denied it. The conductor did not receive the notice and signaled the mtorman to go ahead. The result was as stated. 745

It seems to me that the Caldine case differs radically from the one at bar, both in its details and in the principle involved. In the Caldine case the order was printed and permanent unless countermanded in writing. Here the order was oral, although the company had a long list of printed rules and instructions. In the Caldine case the only negligence alleged against the defendant was the failure of the station agent to inform the conductor, and the act of the motorman in obeying the conductor's order to start. Here the negligence was that of the operators of the train in failing to run with due care under the circumstances. Caldine was in command and his motorman was his subordinate and it was held that the failure of the station agent to stop Caldine from doing what he knew he ought not to do, could not be called a cause of his act. The rule under which Caldine operated was not solely for his own personal safety, but was for the protection of the property of the company and the lives of others. The rule as to Rocco was mainly to safeguard his own safety and the possible liability of the company in case of an accident to him. Besides, I think there was a question of fact as to whether or not the rule was flexible. It seems that Rocco was kept in the employ of the company and on the same job, after having been at least twice admonished and reported for going out in violation of 746 747

748 the rule. Had he known the location of this train on the day of the accident, it may be questioned whether it would not still have been his duty to go out and inspect this track on a day when there had been so many washouts and cave-ins. There are times conceivable when it is the duty of a subordinate, in unforeseen circumstances, to act beyond his orders in the interest of his superiors and might even be censured for not doing so, if an accident had happened due to his failure to go out and inspect the track. I will assume, however, as the jury evidently did, that Rocco was negligent. His negligence was not the sole cause of his death.

749 It may be that Rule 14-D (Q) should not have been admitted in evidence over the defendant's objection. I do not believe that it affected the verdict of the jury. Under it, there should have been blown one short, one long and one short whistle for Stewart Park crossing. Defendant's witnesses testified that two long and two short whistles were blown. The dispute was whether any whistle at all was blown for this crossing. If it was blown as claimed, it would have been as effectual to warn deceased of the approach of the train as though it had been blown in accordance with the rule.

750 All things considered I am of the opinion that the motion to set aside the verdict and for a new trial should be denied.

Submit order.

Dated, January 25, 1930.

STIPULATION SETTLING CASE.

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It is hereby stipulated and consented that the foregoing case and exceptions contains all of the evidence and all of appellant's exceptions presented upon the trial and that an order may be made by Mr. Justice Joseph D. Senn, before whome the case was tried, settling said case and exceptions as herein shown.

Dated July 29, 1930.

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ORDER SETTLING CASE.

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I, Joseph D. Senn, Justice of the Supreme Court, before whom this case was tried, do hereby certify that the foregoing case and exceptions contains all the evidence and all of the appellant's exceptions presented upon the trial, and I do hereby settle the foregoing case and exceptions, and I do hereby order it to be filed as settled.

JOSEPH D. SENN,
J. S. C.

STIPULATION WAIVING CERTIFICATION.

754 It is hereby stipulated by and between the parties to this action, by their respective attorneys, that the foregoing is a true copy of the summons, complaint, answer, judgment, notice of appeal, order denying motion for a new trial, opinion of the Trial Court, and the case and exceptions, and certification thereof pursuant to statute, is hereby waived.

Dated July 29, 1930.

DANIEL CROWLEY, ESQ.,
Attorney for Plaintiff-Respondent,
755 City Hall Bldg.,
Ithaca, N. Y.

COBB & COBB, ESQS.,
Attorneys for Defendant-Appellant,
Savings Bank Bldg.,
Ithaca, N. Y.

756

ORDER OF AFFIRMANCE

757 At a term of the Appellate Division of the Supreme Court held in and for the Third Department at the City of Albany, on November 26, 1930.

Present: HONORABLE CHARLES C. VANKIRK,
Presiding Justice.
HON. HAROLD J. HINMAN,
HON. ROWLAND L. DAVIS,
HON. EDWARD C. WHITMYER,
HON. JAMES P. HILL,
Associate Justices.

---

758 MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,
Plaintiff-Respondent,
vs.
LEHIGH VALLEY RAILROAD CO.,
Defendant-Appellant.

The Lehigh Valley Railroad Company, the defendant-appellant in the above entitled action, having appealed to the Appellate Division of the Supreme Court, Third Department, from a judgment of the Supreme Court, entered in the office of the 759 clerk of the county of Tompkins, on February 19, 1930, and from an order denying a motion for a new trial entered in said clerk's office on February 4, 1930, and the said appeal having been argued by Harold E. Simpson, Esq., of the firm of Cobb & Cobb, of counsel for the appellant, and Riley H. Heath, Esq., of counsel for the respondent, and due deliberation having been had, the Court having

760 rendered its decision in favor of the affirmance of said judgment and order on the opinion of Whitmyer, J., which opinion was concurred in by Hill and Hinman, JJ., and Davis, J. having rendered a dissenting opinion which was concurred in by VanKirk, P. J.

Now, on motion of Daniel Crowley, Esq., attorney for the plaintiff-respondent, it is hereby

Ordered and Adjudged that the judgment and order so appealed from be and they hereby are affirmed and that the plaintiff-respondent recover of the defendant-appellant the costs of this appeal.

JOHN S. HERRICK,
Clerk.

761

JUDGMENT OF AFFIRMANCE

STATE OF NEW YORK
SUPREME COURT—TOMPKINS COUNTY

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff-Respondent,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant-Appellant.

762

The appeal taken by the defendant from the judgment entered in this action on the 19th day of February, 1930, and from the order entered on the 4th day of February, 1930, in the office of the clerk of the County of Tompkins, having been brought to a hearing, and heard at a term of the Appellate Divi-

sion of the Supreme Court, Third Department, held at Albany on November 26, 1930, and an order of said Appellate Division having been made and entered affirming said judgment with costs of said appeal to the plaintiff-respondent on the opinion of Whitmyer, J., Hill and Hasbrouck, JJ. concurring, and the plaintiff's costs having been duly taxed at the sum of $77.29, 763

Now, on motion of Daniel Crowley, Esq., attorney for the plaintiff-respondent, it is hereby

Adjudged that the said judgment and order be and the same hereby are in all things affirmed, and that the plaintiff-respondent, Mary Rocco, as executrix of the last will and testament of Joseph Rocco, recover of the defendant-appellant, Lehigh Valley Railroad Co., the sum of $77.29 costs of said appeal, and that the said plaintiff-respondent have execution therefor. 764

Dated this 28th day of January, 1931.

H. L. O'DANIEL,
Clerk.

765

OPINION

766

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

Plaintiff-Respondent,

against

LEHIGH VALLEY RAILROAD COMPANY,

Defendant-Appellant.

767

Argued November Term, 1930.
Decided January Term, 1931.

HON. CHARLES C. VAN KIRK,
Presiding Justice.

HON. HAROLD J. HINMAN,
HON. ROWLAND L. DAVIS,
HON. EDWARD C. WHITMYER,
HON. JAMES P. HILL,
Associate Justices.

768

Appeal by defendant from a judgment entered on a verdict for $7,257.60, in favor of plaintiff and from an order denying a motion to set the verdict aside and for a new trial.

Daniel Crowley (Riley H. Heath, of counsel) for plaintiff-respondent.

Cobb & Cobb (Harold E. Simpson, of counsel) for defendant-appellant.

OPINION FOR AFFIRMANCE

WHITMYER, J.

769

The action is for negligence under the Federal Employer's Liability Act.

The question is the applicability of the rule of comparative negligence.

Deceased was a track inspector on section 25 of defendant's Auburn-Ithaca single track branch, running northerly from Ithaca, along the easterly shore of Cayuga Lake.

In making his inspection, he used a speeder, having two wheels on the right side and one wheel on the left, and operated by foot. It could be taken from the track, readily. 770

While on the way northerly on December 8, 1927, about 3:30 P. M., he was killed in a collision with a passenger train, of two cars, drawn by a gasoline engine, going southerly.

The collision occurred on a curve, where the view was obstructed from each direction.

Failure to sound the whistle in approaching the curve was the charge of negligence against defendant.

A rule required two toots of the whistle, not short blasts, but somewhat prolonged, "running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal, and approaching curves and other points where the employees may be at work on tracks or bridges." 771

The applicability of the rule was questioned, but there was evidence that it applied to a single as

well as to a double track, and there was corroborating evidence that whistles had been sounded in approaching the curve since June, 1920.

772

A high wind was blowing from the lake on that day; the track had been washed out in places and repair gangs were repairing it; the train was very late and was losing time right along; deceased was due to leave Ithaca at 3:30 P. M.; the engineer knew it; and the question arises whether or not the engineer should not reasonably have suspected that workmen or deceased would be in the vicinity of the curve, when the train reached it.

In that situation, whether or not there was a duty to sound the whistle at the curve and whether or not it was actually sounded there, were questions of fact. (Blanchard v. D., L. & W. R. R. Co., 211 N. Y., 79, 84; Schowerer v. N. J. & N. Y. R. R. Co., 164 App. Div., 865; McAuliffe v. N. Y. C. & H. R. R. Co., 172 App. Div., 597, 602; Smith v. Delaware & Hudson Co., 227 App. Div., 269, 271.)

773

And, the jury found for plaintiff on the questions.

On the other hand, defendant claims that the negligence of deceased, in violating an unwritten rule, was the sole and proximate cause of his accident and death. If so, he may not recover. (Unadilla Valley Ry. Co. v. Caldine, 278 U. S., 139; Great Northern Ry. Co. v. Niles, 240 U. S., 444; Frese v. C. B. & Q. R. R. Co., 263 U. S. 1; Davis v. Kennedy, 266 U. S. 147.)

774

The rule required him, before starting out with the speeder, to inquire of the operator or dispatcher about the location of trains on the line.

Defendant had issued a book of rules, but this one had not been printed, although there was evidence that it had been in force since June, 1920. 775

And, there was evidence that deceased knew about it, but that he did not make the inquiry before starting out on this occasion.

However, there was evidence that it was his duty to go out, after making the inquiry, regardless of the location of trains.

While safety was the alleged reason for the rule, it did not prohibit an inspector from starting out after a train had left the last reporting station and before its arrival at Ithaca, if inquiry showed that it had left. 776

If there had been such a prohibition, the violation would have brought the case within the violations in the cited cases.

On this occasion, the train left Ludlowville, the last reported station, eight miles from Ithaca, at 3:14 P. M., and deceased was to start out on his inspection at 3:30 P. M. Inquiry after 3:14 P. M. would have been without avail.

But, it was his duty to go out after inquiring, whether he learned that trains were on the line or not. And, if he had learned where the train was, when he started, he might have been killed, nevertheless. Knowledge of its location would not have helped, if he erred in judgment or was negligent. And there was evidence that he was attempting to remove the speeder from the track, when the train collided with it. 777

Thus, it appears that his failure to inquire about the location of trains was not the primary cause of

778 the collision. The jury found, on sufficient evidence, that deceased was negligent and that the engineer, also, was negligent, and rendered its verdict on the theory of comparative negligence.

We think that the judgment should be affirmed with costs.

DISSENTING OPINION

SUPREME COURT

APPELLATE DIVISION—THIRD DEPARTMENT

779 MARY ROCCO, as executrix, etc., of JOSEPH ROCCO, deceased,

Respondent,

against

LEHIGH VALLEY RAILROAD COMPANY,

Appellant.

DAVIS, J. (dissenting)

780 There was a rule well understood by the deceased employee, that before going out on his "speeder" on his inspection trip, he should obtain from the dispatcher the "line up" of trains on the road. That gave him information where the trains were located and how they were moving so that he would be in no danger from collision with them. It was a rule of safety highly important on this single track road which ran along the lake shore curving around high rocky bluffs where the view ahead was often obscured and the noise of an approaching train could not well be heard.

Had the employee before starting out, sought the information obtainable under this rule he would have discovered that a train running into Ithaca behind schedule time had already passed the last station to the north, and might be expected at any time. He disobeyed the rule and left Ithaca for the north without knowing that a train was approaching. An accident was inevitable. Disobedience of a safety rule is something more than contributory negligence. It may constitute generally, as I think it did in this case, a primary cause of the accident. (Great Northern Ry. Co. v. Wiles, 240 U. S. 444; Southern Ry. v. Gray, 241 id. 333; Frese v. Chicago, B. & Q. R. R. Co., 263 id. 1; Davis v. Kennedy, 266 id. 147; Unadilla Valley Ry. Co. v. Caldine, 278 id. 139; Unadilla Valley Ry. Co. v. Dibble, 31 F. (2d) 239.)

781

782

There is nothing to indicate that there was any duty on the part of the engineer to give a signal at the point where the accident occurred, or that the decedent relied on such a signal. The latter went forth without vital information he might readily have obtained, and the unfortunate accident followed as a result of that primary cause. The burden of responsibility may not so easily be shifted to another by saying that the engineer should have given a whistle signal before rounding the curve, and therefore comparison may be made between negligent acts.

783

I think the judgment and order should be reversed on the law and the complaint dismissed.

NOTICE OF APPEAL TO THE COURT OF APPEALS

784

SUPREME COURT—TOMPKINS COUNTY

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff-Respondent,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant-Appellant.

Sirs:

785

Please Take Notice that the defendant Lehigh Valley Railroad Company hereby appeals to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, Third Department, entered in the office of the Clerk of said Court on the 26th day of November, 1930, affirming a judgment of the Supreme Court, Tompkins County, in favor of the plaintiff and against the defendant in the sum of $7,745.11 entered in the office of the Clerk of the County of Tompkins on the 19th day of February, 1930, and also affirming an order denying the defendant's motion for a new trial entered in the Clerk's Office of the County of Tompkins on February 4, 1930.

786

And the said defendant further appeals from a judgment of the Supreme Court, Tompkins County, entered upon the said order of affirmance in the office of the Clerk of Tompkins County on the 28th day of January, 1931, which judgment affirms the aforesaid judgment of the said Supreme Court,

Tompkins County, entered in the office of the Clerk of Tompkins County on the 19th day of February, 1930. 787

Please take notice further that the defendant appeals from the whole of said order of affirmance and judgment of affirmance as well as from each and every part thereof.

Dated March 19, 1931.

COBB & COBB,
Attorneys for Defendant-Appellant,
Office and P. O. Address,
Savings Bank Bldg.,
Ithaca, N. Y. 788

To:

Clerk of the County of Tompkins,
Ithaca, N. Y.
Hon. Daniel Crowley,
City Hall,
Ithaca, N. Y.

789

STIPULATION WAIVING CERTIFICATION ON APPEAL TO THE COURT OF APPEALS

790

STATE OF NEW YORK

COURT OF APPEALS

MARY ROCCO, as executrix of the Last Will and Testament of JOSEPH ROCCO,

Plaintiff-Respondent,

vs.

LEHIGH VALLEY RAILROAD CO.,

Defendant-Appellant.

791

It Is Hereby Stipulated that the foregoing printed papers to be filed in the Court of Appeals is the appeal book herein and it is further stipulated that the foregoing papers are true copies of the judgment roll, case and exceptions, the order and judgment of affirmance by the Appellate Division, Third Department, opinions of the Appellate Division, Third Department, the notice of appeal to the Court of Appeals and all papers on which the appeal herein is to be heard, and certification thereof is hereby waived.

Dated April 2, 1931.

792

DANIEL CROWLEY,
Attorney for Plaintiff-Respondent,
City Hall Bldg.,
Ithaca, N. Y.

COBB & COBB,
Attorneys for Defendant-Appellant,
Savings Bank Bldg.,
Ithaca, N. Y.

STATE OF NEW YORK, SS:

IN COURT OF APPEALS OF NEW YORK

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 26th day of April, in the year of our Lord one thousand nine hundred and thirty-two, before the Judges of said Court.

Witness the Hon. Cuthbert W. Pound, Chief Judge, presiding.

Wm. J. Armstrong, Clerk.

MARY ROCCO, as Exrx., &c., Respondent,

agst.

LEHIGH VALLEY RAILROAD COMPANY, Appellant

REMITTITUR—April 27, 1932

Be it remembered that on the 21st day of September in the year of our Lord one thousand nine hundred and thirty-one, Lehigh Valley Railroad Company, the appellant in this cause, came here unto the Court of Appeals, by Cobb & Cobb, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Mary Rocco, as executrix, &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Daniel Crowley, her attorney.

Which said Notice of Appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Harold E. Simpson of counsel for the appellant, and by Mr. Daniel Crowley, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from and that of the trial term herein be and the same hereby are reversed and complaint dismissed, with costs in all courts.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment of the Appellate Division and that of the Trial Term be reversed and complaint dismissed with costs in all courts as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, April 27, 1932.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

In Supreme Court of New York

At a Special Term of the Supreme Court held in and for the County of Cortland, in the City of Cortland, on the 4th day of May, 1932.

Present: Hon. E. W. Personius.

Supreme Court, Tompkins County

Mary Rocco, as Executrix of the Last Will and Testament of Joseph Rocco, Plaintiff,

vs.

Lehigh Valley Railroad Company, Defendant

Order on Remittitur

The above named defendant having appealed to the Court of Appeals of the State of New York from an order

of the Appellate Division of the Supreme Court, Third Department, entered at a term of the said Appellate Division held on the 26th day of November, 1930, which order affirmed the judgment of the Supreme Court, Tompkins County, in favor of the plaintiff and against the defendant in the sum of $7,745.11 entered in the office of the Clerk of the County of Tompkins on the 19th day of February, 1930, and from a judgment of the Supreme Court Tompkins County entered upon said order of affirmance in the office of the Clerk of Tompkins County on the 28th day of January, 1931, and the said defendant having appealed from each and every part of said order of affirmance, and judgment entered thereon, and the appeal having been duly argued in the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the judgment of the Appellate Division of the Supreme Court, and the judgment of the Supreme Court Tompkins County appealed from, be reversed, and the complaint dismissed with costs in all courts, and having further ordered that the record aforesaid and the proceedings in that court be remitted to the Supreme Court there to be proceeded upon according to law, now upon reading and filing the Remittitur from the Court of Appeals herein, and upon motion of Cobb & Cobb, attorneys for the defendant, it is hereby

Ordered that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter in Tompkins County.

E. W. Personius, Justice Presiding.

In Supreme Court of New York, County of Tompkins

Mary Rocco, as Executrix of the Last Will and Testament of Joseph Rocco, Plaintiff,

vs.

Lehigh Valley Railroad Company, Defendant

Final Judgment of Reversal on Remittitur

The judgment in this action in favor of the plaintiff and against the defendant in the sum of $7,745.11 having been

rendered in this Court and entered in the office of the Clerk of the County of Tompkins on the 19th day of February, 1930, and the defendant having appealed therefrom the Appellate Division of the Supreme Court, Third Department, which court affirmed said judgment by an order entered at a term of said Appellate Division, held on the 26th day of November, 1931, and thereafter on January 28, 1932, and upon said order of affirmance, judgment having been entered in the Supreme Court Tompkins County affirming said judgment and granting to the plaintiff costs in the sum of $77.29 upon such appeal to the Appellate Division, and thereafter the defendant having appealed to the Court of Appeals of the State of New York and the said Court of Appeals having sent hither its remittitur filed herein on the 16th day of May, 1932, by which it appears that the Court of Appeals has reversed the judgment in the Appellate Division and that of the trial term, and has dismissed the complaint with costs in all courts as aforesaid, and has given judgment accordingly and has remitted the judgment of the said Court of Appeals to this Court to be enforced according to law, and this Court having by an order duly entered herein on the 16th day of May, 1932, ordered that said judgment of the Court of Appeals be made the judgment of this Court and the Court of Appeals having by its order and judgment awarded costs to the defendant in all courts, and the defendant having duly taxed costs as follows:

1. Trial costs in Supreme Court $81.75.

2. Costs upon appeal to Appellate Division $298.24.

3. Costs upon appeal to the Court of Appeals $127.12.

Now, on motion of Cobb & Cobb, attorneys for the defendant, it is adjudged:

1. That the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

2. That the judgment of the trial term entered herein on the 19th day of February, 1930, be and the same hereby is reversed.

3. That the order of the Appellate Division, Third Department, and the judgment of affirmance entered herein

on the 28th day of January, 1931, be and the same hereby are reversed.

The Court of Appeals by its remittitur having granted to defendant costs in all courts, it is further ordered that the defendant have judgment against the plaintiff as follows:

1. Costs upon the trial in the trial court $81.75.

2. Costs upon appeal to the Appellate Division, Third Department $298.24.

3. Costs upon appeal to the Court of Appeals $127.12. Said Costs amounting in all to $507.11, and that the defendant have execution therefor.

Dated May 16, 1932.

L. L. Earl, Deputy Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

Mary Rocco, as Exrx., etc., Respondent,

vs.

Lehigh Valley Railroad Company, Appellant

Appeal from a judgment of the Appellate Division, Third Department, affirming a judgment of Trial Term entered upon the verdict of a jury.

Harold E. Simpson for appellant; Daniel Crowley for respondent.

In Court of Appeals of New York

Negligence—Railroad Employee—Death Due to Disobedience—Federal Employers' Liability Act.—Where a Track Inspector, whose duties require him to ride a speeder fitted to the rails, disobeys the rule of the railroad requiring Track Inspectors to ascertain from the telegraph operators the location of approaching trains, and as a result is killed

in a collision, such negligence is the sole and proximate cause of his death, since the collision would have been avoided had he obeyed instructions.

OPINION—April 26, 1932

O'BRIEN, J.:

On the single-track branch of defendant's railroad extending northerly from Ithaca to Auburn, Joseph Rocco was employed as a track inspector. His duties required him to ride a tricycle speeder fitted to the rails and propelled by hand and foot. Each day he was scheduled to leave Ithaca at 3:30 P. M., inspect the track to Auburn and return. On December 8, 1927, many washouts and landslides had occurred on this track and the south-bound train due at Ithaca at 12:17 P. M. was running more than three hours behind time. Without inquiry relative to the location of this train, Rocco left Ithaca for the north on his schedule and within a few minutes encountered the south-bound train head-on and was killed. The jury as in the case of Kawacz v. D., L. and W. RR. (259NY, —). herewith decided, held that decedent's negligence contributed to his death, but under the Federal Employers' Liability Act apportioned the damage. Our opinion is that the negligence of the deceased was the sole and proximate cause of his death.

The train with which Rocco collided had left Ludlowville, the last reporting station north of Ithaca and eight miles distant therefrom, at 3:14. Inquiry by him previous to his departure from Ithaca would have revealed to him the fact that somewhere on the eightmile stretch of track which he was about to traverse was this belated train. His failure to discover this fact constitutes in itself not only the negligence which the verdict imputes to him, but also a violation of a rule of the road which had existed for more than seven years and of which he had knowledge. It provided that before track inspectors should occupy the track with speeders they should ascertain from the telegraph operators the locations of approaching trains in all directions. This rule had not been reduced to writing, but had been promulgated by the division engineer, and decedent was aware of its existence. Usually he obeyed it, but on two occasions he had disregarded it, and the telegraph operator at Ithaca had warned him to observe it

and had reported these omissions to his superior. On the day of this collision he made no inquiry of the operator. If he had asked, he could have been informed that the southbound train had left the station only eight miles distant and would surely be encountered between Ithaca and Ludlowville. The duty to watch alertly for trains rested on the deceased (Chesapeake & Ohio R. R. v. Nixon, 271 U. S. 218), and his violation of the rule was the primary cause of the accident (Davis v. Kennedy, 266 U. S. 147; Unadilla Valley R. R. v. Caldine, 278 U. S. 139; Unadilla Valley R. R. v. Dibble, 31 Fed. Rep. 2d, 239).

The judgment of the Appellate Division and that of the Trial Term should be reversed and the complaint dismissed, with costs in all courts.

Pound, Ch. J.; Crane, Lehman, Hubbs, and Crouch, JJ., concur; Kellogg, J., not sitting.

Opinion of Court of Appeals reported in 259 N. Y., —.

IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is now here ordered that the time within which petition for Writ of Certiorari may be filed herein be, and the same is hereby, extended for a period of thirty days from this date.

Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States.

Dated this 15th day of August, 1932.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,056. New York Supreme Court. Term No. 359. Mary Rocco, as executrix of the last will and testament of Joseph Rocco, deceased, petitioner, vs. Lehigh Valley Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed September 9, 1932. File No. 37,056.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

ABRAHAM W. FEINBERG,
CLAYTON R. LUSK,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mary Rocco as executrix respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is an action for the negligent killing of Joseph Rocco, brought under the Federal Employers' Liability Act. Decedent, a track inspector and repair-

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Mary Rocco as executrix respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is an action for the negligent killing of Joseph Rocco, brought under the Federal Employers' Liability Act. Decedent, a track inspector and repair-

man, on December 8, 1927, was run down and killed on a blind curve by the defendant's train.

Unusual Physical Conditions.

The single track branch of the railroad extending from Ithaca to Auburn, forty-two miles, runs along the eastern edge of Cayuga Lake, sometimes within ten feet of the water's edge (R. 62). This line was subject to frequent washouts and landslides (R. 95-96) and on such occasions, of course, the work of the track inspectors was most important.

On the 8th of December, 1927, there was a very strong northwest wind blowing over Cayuga Lake, which was driving waves over the tracks and causing washouts (R. 34, 62, 95, 96), which were liable to occur at any time (R. 96). The place of the accident at the southeast corner of the lake, is on a curve; trees and boathouses effectively shut off any view of an approaching train across, or inside the curve (R. 26, 27, 28). The high wind, nevertheless, was driving the water across the tracks at the place of the accident, which caused the rails to be so wet that the brakes did not hold (R. 175).

Decedent's Duties.

Defendant claimed the existence of a rule or instruction, not in the printed rule book, to the effect that the decedent was to inquire of the station operator as to the position of trains before he went out on his tour of duty, and that, on the occasion mentioned, he did not make this inquiry (R. 127). The Division Engi-

neer testified that it was the duty of the decedent to go out, inspect the tracks, and make repairs regardless of where the trains were and that no one could have told, on the day in question, owing to the condition of the track and the trains not keeping any schedule time, where the train actually was (R. 104).

Defendant's Duties.

Plaintiff introduced in evidence a rule of the defendant requiring blasts of the whistle to be given when the train is "approaching curves and other points where employees may be at work on tracks or bridges" (R. 53, 54).

It was further shown that the train entered the curve with no available view as to whether decedent was in the curve, or indeed, whether there was a washout in the curve or not; on rails wet with the waves; at a rate of speed of thirty miles an hour.

The action was tried in the Supreme Court Tompkins County before a Justice and Jury in March, 1929. The jury returned a verdict of $12,096.00 which was reduced by 40 per cent by reason of plaintiff's contributory negligence, judgment being entered for $7,257.60 damages and costs. This judgment was affirmed by the Appellate Division, Third Department, in November, 1930. The opinion of the Appellate Division of the Supreme Court and dissenting opinion appears at pages 257 to 261 of the Record (R. 1, 2) and is reported in 231 Appellate Division 323. Upon appeal to the Court of Appeals of the State of New York, that Court reversed the judgment of the Trial Court

and the affirmance of the Appellate Division and dismissed the complaint. The opinion of the Court of Appeals is reported in 259 N. Y. ——. It appears in the Record pages 271-273. Final judgment of Reversal was entered in the Supreme Court Tompkins County on the 16th day of May, 1932. The proceedings of the Appellate Division of the Supreme Court and Court of Appeals of the State of New York were remitted to the Supreme Court of Tompkins County and this Petition is made for a Writ of Certiorari directed to the Supreme Court of the State of New York. The time within which this Petition for Writ of Certiorari might be filed was extended for thirty days by an order made by Associate Justice Cardozo on August 15, 1932. The time as extended is believed to expire on the 14th of September, 1932.

Reasons Relied on for the Allowance of this Writ of Certiorari.

1. THE UNITED STATES SUPREME COURT OUGHT TO GRANT THE WRIT OF CERTIORARI IN THIS CASE IN ORDER TO DEFINE AND PROPERLY LIMIT THE APPLICATION OF DAVIS V. KENNEDY (266 U. S. 147) and UNADILLA VALLEY RAILROAD V. CALDINE (278 U. S. 139). These cases do not govern where the claimed negligence of the decedent consisted in his failure to acquire knowledge of the general location of a train running three hours behind time and the negligence of the defendant consisted in *failure to give adequate warning to the decedent of the train's entrance into a curve, blind at both ends,* IN ACCORDANCE WITH A RULE *intended for the protec-*

tion of track-workers in this curve under unusual circumstances.

2. THE HONORABLE COURT OUGHT TO GRANT THE WRIT OF CERTIORARI IN THIS CASE IN ORDER TO ENABLE IT TO PROPERLY DEFINE HOW TO DETERMINE AS A MATTER OF LAW, THERE BEING NEGLIGENCE ON BOTH SIDES, WHOSE NEGLIGENCE WAS "PRIMARY" AND WHOSE NEGLIGENCE WAS "SECONDARY", OR WHEN DOES CONTRIBUTORY NEGLIGENCE BECOME THE PRIMARY CAUSE OF AN ACCIDENT?

3. THE UNITED STATES SUPREME COURT OUGHT TO ALLOW THIS WRIT OF CERTIORARI IN ORDER TO ENABLE IT TO PROPERLY DEFINE THE LIMITATIONS OF THE DOCTRINE SET FORTH IN CHESAPEAKE AND OHIO V. NIXON (271 U. S. 218).

4. WE MAINTAIN THE COURT OF APPEALS OF THE STATE OF NEW YORK TO BE IN ERROR IN HAVING REVERSED THE TRIAL TERM AND THE JUDGMENT OF THE APPELLATE DIVISION OF THE SUPREME COURT, THIRD DEPARTMENT, UPON THE THEORY THAT THE DECEDENT'S VIOLATION OF A RULE WAS THE PRIMARY CAUSE OF THE ACCIDENT AND THAT THE DUTY TO WATCH FOR TRAINS RESTED SOLELY ON THE DECEDENT.

It is urged in this Petition and the accompanying Brief that the Court of Appeals of the State of New York has decided the questions above set forth in a way not in accord with the applicable decisions of this Court and the applicable decisions of the Circuit Court of Appeals of the Second Circuit in cases decided within the last two years.

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and proceedings in the case entitled: STATE OF NEW YORK, SUPREME COURT, TOMPKINS COUNTY: Mary Rocco as Executrix, etc., Plaintiff, against Lehigh Valley Railroad Company, Defendant, and that the judgment of the Supreme Court entered upon the Remittitur in the Court of Appeals of the State of New York may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court seem meet and just; and your Petitioner will ever pray.

MARY ROCCO,
As Executrix of the Last Will and Testament of Joseph Rocco, Deceased.

By ABRAHAM W. FEINBERG,
CLAYTON R. LUSK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Jurisdiction.

1. This action was brought under the Federal Employers' Liability Act (35 Statutes 65, 66). It was conceded that the tracks of the defendant were used at the time of the accident for interstate business (R. 18). The case was submitted to the jury as an action under the Federal Employers' Liability Act without objection from the defendant (R. 222). The petitioner seeks

a review by certiorari pursuant to Section 237 (*b*) of the Judicial Court on the grounds that the petitioner seeks certain rights, privileges and immunities under the Federal Employers' Liability Act which the petitioner claims were denied by the judgment of reversal of the Court of Appeals of the State of New York.

2. The date of the judgment to be reviewed is May 16, 1932, Record page 269. This judgment is the final judgment of the Supreme Court of the State of New York entered upon the order and remittitur of the Court of Appeals of the State of New York. This final judgment reversed a judgment in favor of the plaintiff and against the defendant in the trial term entered upon a verdict of the jury. It also reversed an affirmance thereof by the Appellate Division, Third Department of the Supreme Court of the State of New York. By an order of Associate Justice Cardozo to whom the matter had been referred by Associate Justice Stone, in charge of the Second Circuit, the time within which the petition for writ of certiorari might be filed herein was extended for a period of thirty days by an order made and dated the 15th day of August, 1932. It is believed that your petitioner's time to file this petition for a writ of certiorari expires on the 14th day of September, 1932.

3. It is submitted that the judgment and order of reversal by the Court of Appeals of the State of New York does not conform to the applicable decisions in the United States Supreme Court and in the Circuit Court of Appeals for the Second Circuit; and that the writ of certiorari ought to be granted in order that

the United States Supreme Court may properly define and limit the application of certain rules set forth in general language in *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218); *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

4. So far as jurisdiction of the Supreme Court of the United States is concerned all the foregoing cases may be cited to sustain the jurisdiction of the Supreme Court of the United States, to wit: *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218), *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

II.

Statement of the Case.

On the single track branch of defendant's railroad extending northerly from Ithaca to Auburn decedent was employed as a track inspector. His duties required him to ride a tricycle speeder fitted to the rails and propelled by hand and foot (R. 59, 60). It was misnamed "speeder" because its speed was not much faster than a walk (R. 62). It carried implements for the repair of the tracks (R. 59, 60). The track from Auburn to Ithaca was subject to many washouts and landslides (R. 34, 62, 95, 96). It ran along the eastern edge of Cayuga Lake and on the day of the accident a high west wind caused the waters of the lake to wash over the tracks, resulting in many washouts (R. 34, 62, 95, 96). The train which hit the decedent was south-bound and due to arrive in Ithaca at 12:17 p. m.

It was over three hours late in covering a distance of some forty miles on account of the high wind causing washouts on the day of the accident (R. 104). At 3:30 in the afternoon Rocco left Ithaca on his speeder to cover some seven and one-half miles in accordance with his fixed schedule and was killed about a mile from Ithaca by the delayed train in a blind curve on the edge of the lake where the decedent could not see the approaching train nor the motorman of the approaching train see decedent (R. 24, 27, 28, 29, 58, 67).

The written rule for the government of employees did not require Rocco to inquire as to location of trains but there was evidence of the oral promulgation of an order requiring such an inquiry to be made by track inspectors before leaving Ithaca (R. 127, 128, 129).

The oral order was "lived up to" in a certain respect (R. 128). It was claimed by the defendant's witnesses that decedent went out without inquiring as to the location of trains, although decedent having been killed could not deny this (R. 129). However, it was decedent's duty to go out on his speeder regardless of the location of trains (R. 20, 45); in other words, there was no prohibition against his occupying the tracks with the speeder and performing his duties. The train dispatcher admitted (R. 155) that no one could have told Rocco at 3:14 in the afternoon when the train left Ludlowville where it was even if he had inquired at 3:30, and the witness Pierce admitted that no one could tell where the train would be at any particular time due to the waves washing

over the tracks (R. 104). The train was not running on any schedule or keeping any time (R. 104). The evidence shows that the train was proceeding as the tracks ahead of it were fixed. Among the various duties of the decedent was the duty to fix these tracks if needed.

Rocco had proceeded to the corner of the lake, where the tracks were wet with the waves, where he was hit and killed in the curve before mentioned, where he had no view of the approaching train, nor the engineer of the approaching train of him. As a matter of fact had Rocco called up to find out the location of the trains he would have found that a freight train had left the station at Ludlowville at 2:30 p. m. over forty minutes before the passenger train had left Ludlowville which was at 3:14 p. m. and he would not have found out that the faster electric train had passed the noisier freight on a siding (R. 160, 161). Despite the condition of the tracks, washouts and landslides, the engineer, three hours late, entered this blind curve where Rocco was performing his duties at a speed of thirty miles an hour (R. 172). He could not stop the train after sighting Rocco attempting to take the speeder off the track because the waves were wetting the rails (R. 175). Rocco was either proceeding at about four miles an hour as testified to by Stevens or had stopped as testified to by the engineer (R. 61, 171). The plaintiff introduced in evidence a written rule of the defendant requiring the engineer when approaching curves and other points where employees may be at work on tracks or bridges

or when approaching highway crossings or running against the current of traffic to sound short blasts of the whistle (R. 54). The plaintiff also introduced Rule 105, which reads: "Both the conductor and engineman are responsible for the safety of the train, the observance of the rules; and, under conditions not provided for by the rule must take every precaution for protection" (R. 54). There was some dispute as to the interpretation of these rules but the plaintiff also relied on the common law liability of the railroad for negligence in entering a blind curve where the engineman knew, or ought to have known, that men might be at work without giving signals commensurate with the speed of the train. See *Blanchard* v. *D. L. & W. R. R.* (271 N. Y. 79).

Whether or not the defendant was negligent in not sounding proper warning for Rocco's benefit before entering blindly into the curve on the wet rails at a speed of thirty miles an hour was submitted to the jury. The question of Rocco's contributory negligence, if any, in not ascertaining the location of this train was submitted to the jury. There was also submitted to the jury the question of whether Rocco's failure to gain this additional knowledge was wholly the cause of the accident (R. 236). The jury found for the plaintiff in the sum of $7,257.60.

The Court of Appeals in reviewing this finding, and the intermediate finding of affirmance of the Appellate Division Third Department, holds in effect first on the authority of *Chesapeake and Ohio* v. *Nixon* (271 U. S. 218), that the duty to watch for the trains was on Rocco and by implication, though the Honorable Court does

not say so, that the defendant owed no duty of warning to Rocco, and second, the Court of Appeals holds that Rocco's violation of the unwritten rule about ascertaining the location of trains was the primary cause of the accident. This on the authority of *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139).

III.

Specification of Errors.

1. The Court of Appeals erred in holding on the authority of *Davis* v. *Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad* v. *Caldine* (278 U. S. 139), that violation of the rule of inquiry as to the location of trains, by Rocco, was the primary cause of the accident, in the case at bar.

2. The Court of Appeals erred in holding, on the authority of *Chesapeake and Ohio Railroad* v. *Nixon* (271 U. S. 218), that the duty to look out for trains rested solely on Rocco; and in implying, that the motorman under all the physical conditions here present and under the defendant's rules had no duty to look out for Rocco.

3. The Court of Appeals erred in reversing the judgments of the trial court and the Appellate Division of the Supreme Court, Third Department, based on the jury's verdict that defendant was negligent and that plaintiff's negligence was contributory merely.

IV.

ARGUMENT.

A. Violation by decedent of the unwritten rule to inquire as to the location of a train could not be the "primary" cause of this accident, or the "sole proximate" cause, so long as there co-existed, concurrent, independent negligence of the motorman in failing, either (a) to obey a written rule to warn by short blasts any track worker before entering the blind curve, or (b) to exercise ordinary care and prudence in driving a train three hours late over a wet track subject to washouts and, therefore where there might be workmen, at thirty miles an hour, into the blind curve, without warning adequate to his speed, or otherwise having his train under such control as a reasonable trackwalker would have a right to expect considering the abnormal conditions of the track.

1. First it is to be observed, that the rule as to inquiry for trains was proven solely by defendant's witnesses which plaintiff was not in a position to deny. It was in the jury's province to disbelieve even the existence of such a rule.

2. It was admitted that the rule if alive, was of six years' standing and still not printed in the rule book. It was in the province of the jury to find that the rule was not a rigid one.

3. But for the sake of the argument treating the rule as extant, it did not constitute a prohibition of a certain course of action, namely going out on the track.

THE VIOLATION OF SUCH AN ABSOLUTE WRITTEN PROHIBITION WAS AN ESSENTIAL ELEMENT IN DAVIS V. KENNEDY AND UNADILLA VALLEY V. CALDINE, SUPRA.

Indeed in the case at bar it was Rocco's duty to go out on the tracks. Perhaps he might have to repair a washout to permit this very train to reach Ithaca, or the train ahead of it out of Ludlowville, that is the freight train. *Moreover had he called up the station master at* 3:30 *p. m. he would have found that the freight train had left Ludlowville* (*the last telegraph station before Ithaca*) *at* 2:30 *p. m., forty minutes ahead of the passenger train which left Ludlowville at* 3:14 *p. m.* (R. 160); *and, entirely contrary to Judge O'Brien's opinion in the Court of Appeals* (R. 272), *he would have been justified in believing from the elapse of an hour to cover eight miles, that both trains were held up by washouts in his patrol section.* Indeed without calling up the station agent he could before reaching the curve see up the lake and detect the smoke of the steam freight train, had he looked, and he might have relied on this observation as to the location of the freight train which had left Ludlowville first. NO AMOUNT OF CALLING UP THE STATION AGENT WOULD HAVE TOLD HIM THAT THE FAST, SILENT, MOTOR-DRIVEN PASSENGER TRAIN HAD PASSED THE SLOW, NOISY, STEAM-POWERED FREIGHT TRAIN AT AN INTERVENING SIDING AT PORTLAND POINT.

4. The Supreme Court of the United States should lay down the rule that the doctrine of *Davis* v. *Kennedy* and *Unadilla Valley Railroad* v. *Caldine* is inapplicable to cases such as the one at bar, where there is proof of concurrent primary negligence on the part

of the defendant. In neither of those cases was there any concurrent primary negligence on the part of the defendant. If counsel has inaptly stated what we consider are and ought to be the limitations on the rule in those cases, the Honorable Court ought to clarify the proper limitations on the doctrine of those cases, and the development of the law in that respect.

There is the further limitation exemplified by *Unadilla Valley Railroad* v. *Dibble* (31 Fed. 2d Series 239; writ denied 280 U. S. 565), that the negligence of the defendant cannot be predicated upon the act of an employee, who *participates* with the plaintiff in the violation of a rule of prohibition.

B. The doctrine that a track worker, having the duty to inspect and repair, assumes the entire risk of being run down by trains (Chesapeake and Ohio v. Nixon, 271 U. S. 218) is or should be limited by this Honorable Court to ordinary cases of straight tracks and clear views, but has no proper application to workmen hidden by blind curves, or to cases where a written rule, as here, required the giving of warning under unusual circumstances, or where a warning is customarily given, or where presence of workmen is known to the engineman.

1. Such or similar limitations on the general statement contained in *Chesapeake and Ohio* v. *Nixon* have been implied or applied by the Circuit Court of Appeals for the Second Circuit in the following cases:

Norfolk & Western v. *Kratzer* (37 Fed. 2d Series 522).

Reynolds v. *New York, Ontario and Western* (42 Fed. 2d S. 164), 1930.

Dissenting opinion of Judge Chase in *Biernacki* v. *Pa. R. R.* (45 Fed. 2d S. 677), 1930.

Wyatt v. *New York, Ontario and Western* (45 Fed. 2d S. 705), 1930.

In the last case the court said, referring to *Chesapeake and Ohio* v. *Nixon, supra,* "This Court is committed to the doctrine that those decisions are inapplicable, when the railroad violates its own rule requiring the ringing of the engine bell when the engine is about to move."

2. It is submitted that the Court of Appeals erroneously applied the case of *Chesapeake and Ohio* v. *Nixon* to the case at bar, in view of the facts found by the jury that the defendant was negligent in violating its own rule in not adequately warning Rocco, and in view of the unusual circumstances existing in this case, which cast as well a common law duty on the motorman to use due care under all circumstances, in which duty he failed.

It is earnestly submitted that this Honorable Court ought by granting this writ of certiorari to declare in this case the limitation upon the general doctrine of *Chesapeake and Ohio* v. *Nixon,* in accordance with the above cited limitations in the cases in the Second Circuit Court of Appeals.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its super-

visory powers and that a writ of certiorari should be granted to your petitioner and this Court should review the judgment of the Supreme Court of the State of New York entered on the order of the Court of Appeals of the State of New York and reverse the same.

Respectfully submitted,

CLAYTON R. LUSK,
Counsel for Petitioner.

(2410)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,
PLAINTIFF-PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY,
DEFENDANT-RESPONDENT.

BRIEF OF PLAINTIFF-PETITIONER ON THE MERITS ON WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK.

ABRAHAM W. FEINBERG,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,
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DEFENDANT-RESPONDENT.

BRIEF OF PLAINTIFF-PETITIONER ON THE MERITS ON WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK.

ABRAHAM W. FEINBERG,
Counsel for Petitioner.

I.

The Opinions of the Courts Below.

The Trial Court, the Supreme Court of New York, Mr. Justice Joseph D. Senn presiding, sitting at Ithaca, New York, in Tompkins County, denied defendant's motion to set aside the verdict and for new trial and wrote an opinion which is unreported. (R. 247-250).

The Appellate Division, Supreme Court, Third Department, affirmed the judgment for the plaintiff by a divided

court. The majority opinion of Justices Whitmyer, Hinman and Hill for affirmance appears at 257 of the Record and the dissenting opinion of Justice Davis and Presiding Justice Van Kirk appears at P. 260 of the Record; both are reported in 231 Appellate Division 323.

The Court of Appeals reversed the judgment and decision of the lower courts unanimously and dismissed the complaint with an opinion which appears at P. 269-271 of the Record and is reported in 259 N. Y. 51.

The decision of the Court of Appeals sought to be reversed was duly entered in the office of the Clerk of the County of Tompkins on the 16th day of May, 1932 (R. 265-269).

Mr. Justice Cardozo, by an order, granted on August fifteenth, 1932, extended to September 14, 1932, the time within which the Petition for Writ of Certiorari might be filed herein.

The order allowing the Writ was filed in the Supreme Court of the United States on October 17, 1932.

II.

Jurisdiction.

It is believed that the grounds on which the jurisdiction of this Court is invoked have been sufficiently set forth in the Brief in Support of the Petition for Writ of Certiorari. The Writ was granted on October 17, 1932, under File number 37,056 (R. 272).

III.

Statement of the Case.

The case is sufficiently stated in the Petition for the Writ of Certiorari under the heading "II Statement of the Case." In the interest of brevity the statement will not be repeated here but Reference to the facts will be made and repeated (and the pertinent Railroad Rules set out in full) in the body of the Brief only as necessary to a discussion of the questions involved.

IV.

Specification of Errors.

1. The Court of Appeals erred in holding on the authority of *Davis v. Kennedy* (266 U. S. 147), and *Unadilla Valley Railroad v. Caldine* (278 U. S. 139), that violation of the rule of inquiry as to the location of trains, by Rocco, was the primary cause of the accident in the case at bar.

2. The Court of Appeals erred in holding, on the authority of *Chesapeake & Ohio Railroad v. Nixon* (271 U. S. 218), that the duty to look out for trains rested solely on Rocco; and in implying, that the motorman under all the physical conditions here present and under the defendant's rules had no duty to look out for Rocco.

3. The Court of Appeals erred in reversing the judgments of the trial court and the Appellate Division of the Supreme Court, Third Department, based on the jury's verdict that defendant was negligent and that plaintiff's negligence was contributory merely.

ARGUMENT.

POINT I.

The Court of Appeals, having disposed of this case as a matter of law, all questions of negligence, all conflicts of evidence, all facts or inferences of facts MOST FAVORABLE TO THE PLAINTIFF must be deemed established by the verdict in plaintiff's favor.

The Court of Appeals did not consider any specific exceptions raised on the trial but considered only the theories of law applicable as was within its province. The Court of Appeals did not rule upon any question of admissibility of evidence. The Court of Appeals in considering Rocco's

negligence accepted the jury's verdict as establishing that negligence upon him.

Judge O'Brien in his opinion, which is the opinion of the Court, said in the third sentence in the second paragraph of the opinion (R. 270) "His failure to discover this fact constitutes in itself not only the *negligence which the verdict imputes to him*, but also a violation of a rule of the road which had existed for more than seven years, and of which he had knowledge." (Italics ours.)

We believe it follows that if the verdict imputes any negligence to the defendant, which it does, that the negligence must be regarded as established, saving only the question whether such established negligence is sufficient *in law* under the Federal Employers' Liability Act to justify and support the verdict. The facts themselves, and all inferences of fact to be drawn therefrom, most favorable to the plaintiff must be deemed established. The Court has held this proposition in the following cases:

> "The testimony shows, *and*, in deciding a question of this character, the view must be *taken of it most favorable to the plaintiff*." Kreigh v. Westinghouse C. K. & Co., 214 U. S. 249. (Italics ours.)

The question of negligence is itself peculiarly within the jury's province as was said in Grand Trunk R. R. v. Ives, 144 U. S. 408:

> "It is their (jury's) province to note the special circumstances and surroundings of each particular case, and then say *whether the conduct of the parties* in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. *When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury.*" (Italics ours.)

In considering the question of negligence the Court will

not withdraw that question from the jury unless the established facts are such that "all reasonable men must draw the same conclusion from them." *Gardner v. Michigan Central R. Co.*, 150 U. S. 349.

As to the jury's province to draw inferences reference may be made to the opinion of Mr. Justice Stone in *New York Central v. Marcone*, 281 U. S. 345, where he said "But *the inference to be drawn* from this testimony as to the existence of the custom, its purpose, and the reliance which deceased under all the circumstances was entitled to place upon it, *was for the jury.*" (Italics ours)

We do not claim that the application of these principles forecloses this Court from the consideration of the question of whether the evidence is, as a matter of law, sufficient to establish the negligence found by the jury both as to the defendant and as to the plaintiff. That question was properly before the Court of Appeals and we believe properly here. The above point is made at the threshold of the consideration of that problem because we believe that the Court of Appeals in reversing this case upon the authority of Chesapeake & Ohio v. Nixon, Unadilla Valley v. Caldine and Davis v. Kennedy did not take into consideration *all* the facts and inferences found by the jury.

POINT II.

The breach of duty owed by defendant's motorman to give decedent timely, adequate warning by whistle or otherwise in accordance with (a) defendant's written rules, and (b) its customary practice, and (c) the exercise of ordinary care and prudence under all the circumstances, constituted such independent concurrent negligence as to contribute to the accident and to justify and support the jury's verdict under the Federal Employers' Liability Act.

(a). *Motorman's breach of duty in respect to written rules.*

The following rules were put in evidence from defendant's Rule Book (R. 53, 54, 55, 56):

"Page 21 under the title 'Signals', title subject engine and motor whistle signals, page 19."

"The signals prescribed are illustrated by "O" short sound; "—" for longer sounds. The sound of the whistle should be distinct, with intensity and duration proportionate to the distance signal is to be conveyed."

Subdivision D of Rule 14:

"(q) O—O running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal and approaching curves and other points where the employees may be at work on track or bridges."

Rule 105.

"Both the conductor and engineman are responsible for the safety of the train, the observance of the rules and, under conditions not provided for by the rules, must take every precaution for protection."

Rule 1088, under same sub-heading:

"Road watchmen must carefully examine the track and roadbed and see that they are in safe condition."

Rule 1028, under the heading enginemen:

"Enginemen of engines running light must exercise great care in looking out for motor cars, handcars and trucks and sound the whistle frequently at dangerous places, or where the view of approaching trains are obstructed, to warn the employees using these cars of their approach."

Subdivision D, Rule 14, "(q)".

The applicability of Subdivision D, Rule 14, "(q)" was disputed, defendant claiming through certain witnesses that the rule applied only to double track by virtue of certain "bold-face type", and that the matter before the semi-colon

qualified the whole rule. The plaintiff claimed that the rule meant what it said and was applicable. There was a difference of opinion among defendant's own witnesses. The locomotive engineer and examiner on rules, Mr. Truman, called as an expert by the defendant, on his direct examination testified that the rule applied to single track as well as double track (R. 115), and this witness, Truman, was the man who instructed Rocco as to the oral rule about inquiring for train "line-up" before going out on his section patrol. Other defense witnesses testified to a contrary interpretation. The jury, as judges of credibility and conflicting testimony, evidently believed Mr. Truman on both scores, as they had the undoubted right to do. The applicability of Subdivision D, "(q)" of Rule 14 was established, out of the mouth of defendant's witness by the defendant on his direct examination, *as a fact.*

Neither the Appellate Division nor the Court of Appeals has questioned the authenticity of this fact; on the contrary, the Appellate Division, who had power, under the New York Practice, to review the facts, expressly regarded the fact above stated as established (R. 258).

The verdict established as a fact that the motorman knew about persons having lawful business on the track, which included Rocco, might be in this very curve where the accident happened. Such knowledge is alleged in the complaint (R. 6, 7, fol. 18, 19). The question of such knowledge was submitted to the jury to determine (R. 233). The motorman, Silke, (R. 167) who had been operating on this division about 7 months (R. 175), knew this particular rule (R. 176); he was over three hours late on account of washouts and landslides; he was specifically watching for people on the track at the time of the accident (R. 187, fol. 560). He was operating on a division to which on account of the constant danger of washouts and landslides there was assigned a regular patrol system of inspection by men on slow-moving speeders, of whom Rocco was one. (R. 95, 96).

It is a fair inference from the time of his operation on this division that he knew that there was such an inspector of

the track from Ludlowville to Ithaca. It is a fair inference from the unusual events of that day and the unusual danger which made him over three hours late and from repair work that was being done ahead of him all the way from Auburn to Ithaca and from the fact of high water, high winds, and the water on the track on this particular curve, *that he knew that workmen might be encountered at that very point of danger, the last point of danger before the track left the shoreline of Cayuga Lake.* Even if there had been evidence proferred by the defendant to negative such knowledge, the question would be for the jury, but there was no evidence negativing such knowledge. So, for the purpose of this appeal the knowledge herein referred to upon the engineer's part must be deemed established as a fact.

We come now to the ultimate fact of the defendant's negligence, namely, that the engineer with knowledge of the applicable rule and knowledge of the presence of workmen at the point of danger to his very train on account of the unusual conditions and with knowledge of the extremely dangerous blind curve did not give the whistle warning required by the rule. The established fact is that he did not give the warning for the crossing which was 469 feet south of the point of the accident (R. 25, 26), though there was a sharp conflict as to whether the crossing signal was given. Two witnesses, the only disinterested ones, having testified that no signal was given, the jury's verdict resolves that conflict in plaintiff's favor upon evidence which it was entitled to believe,—that of Stevens, the zoological specimen collector, who was in a remarkably good position to hear a whistle; and that of Testut, the government mail clerk, who was on the train, heard the bell ringing and did not hear the whistle. But the crossing whistle, even had it been given, would not avail to warn Rocco and would not necessarily be a compliance of adequate and timely warning to him engaged in inspection on this very curve over which the waters were washing.

The jury had a right to infer also that the engineer knew

that the road inspector, Rocco, had an afternoon tour of duty.

In respect to this failure to warn Rocco by whistling, in violation of the rule aforesaid, we submit that every essential fact is conclusively established by the jury's verdict based on sufficient evidence. In establishing this fact of negligence on the part of the defendant we are, of course, disassociating all questions of assumption of risk and plaintiff's contributory negligence.

In respect to the plaintiff's railroad rules 105 and 1028, we claim that they confirm and support the binding effect upon the defendant of Rule 14, Subdivision D. The enactment of these rules is obviously intended to close possible loopholes of escape in other rules. They certainly were not intended to provide a *lower* standard of care on the part of the engineer.

(b) *The motorman's breach of duty in respect to defendant's customary practice.*

The three rules, Rule 14, Subdivision D, "(q)", Rule 105 and Rule 1028 read together, show a recognition upon the part of the defendant of the standard of care to be observed in approaching curves where employees may be working on the track or may be on hand cars out of view of approaching trains.

This recognition of the need for a higher standard of care is what confirms and corroborates a custom to warn at a particular point. And even though the rule may not specifically cover that location, the fact that a high standard has been adopted as shown by the rules, a custom in consonance with the general rules, should require very little proof. We do not here cite the rule as a custom but we cite the general principle of the rule as authorizing and showing recognition of a custom which may spring up at any point.

The witness Kish testified (R. 47) that the whistle on southbound trains blew as they came into this curve ever since he had worked there, which was since 1920, some

seven years. The jury could have found a custom from this fact, confirmed as to the specific curve by the same corroborating effect of the rules aforesaid. Justice Whitmyer, in the majority opinion of the Appellate Division (R. 257, fol. 771) accepted this evidence when he said: "This whistle had been sounded in approaching the curve since June 1920" as corroborating the applicability of Subdivision D of Rule 14. Our point is that the jury was justified in finding a custom to blow the whistle at that particular point and so must be presumed to have found the custom as an established fact in the case.

(c) *The motorman's breach of duty in respect to the exercise by him of ordinary care and prudence under all the circumstances.*

It is submitted that if negligence is the failure to do that which a reasonably prudent person would do under all the circumstances, then it follows that entirely independent of rules or customs the defendant's motorman was negligent in failing to adequately warn Rocco under all the circumstances of this case. We have the extraordinary conditions of operation obtaining on the 8th of December, 1927; the many washouts on the Ithaca-Auburn road that day; the consequential fact that the train was over three hours late at the time of the accident. (R. 104). It was not running on any schedule or keeping any time. (R. 104). We have the knowledge, actual or constructive, on the part of the motorman of the patrolling of this very roadbed by Rocco and other employees especially for this condition on every day. (R. 99). We have his knowledge, actual or constructive, that Rocco was to be encountered somewhere in that last seven miles, and that he would be engaged in the very essential operation of inspecting for repairing under the extraordinary conditions of the roadbed on that day. We have his knowledge that the blind curve the last at the head of the lake where the waters were piling up three feet higher than usual (R. 61) and where the rails were wet with the water coming in between the boathouses on the

curve (R. 175). These were not ordinary conditions of operation. They were extraordinary, yet the motorman entered the blind curve at 30 miles an hour (R. 172, 175) a speed not extraordinary in itself but extraordinary considering the operating conditions at that point and on that day.

"*If under the circumstances*, the speed of the train and the failure to give any warning signals, in combination, constituted negligence, the jury was warranted in finding it to have been the proximate cause of the accident." Chicago, M. St. P. R. R. vs. Kane 33 Fed. 2nd 866, at 869 certiorari denied 280 U. S. 588. (Italics ours)

The government employee, Testut, who was offered as a witness by the defendant, testifying on direct examination of his opportunity for seeing ahead said that he had opened the door leading into the front vestibule "when we were going around that curve where those trees were." (R. 203). We quote from his testimony as to why he opened the door:

> "Q. 'Any reason?' "
>
> "A. 'We had had trouble with the tracks and I wanted the door open so I could jump if necessary. We had several occasions.' "

This bit of testimony throws a strong light on whether the motorman was operating the train with due care under the conditions.

Then we have the testimony of the motorman himself (R. 175) who testified that on account of the wet rail at the time and place of the accident he could not stop the train though he immediately applied the emergency brakes until he had reached the crossing (R. 192), a distance of 469 feet. (R. 25, 26)

Let us suppose that there had been a washout in that blind curve,—not at all an improbability on that day and place, but from the motorman's standpoint it should have been a distinct probability, when we consider Testut's direct testimony that he had opened the door when "going around that curve" so he could jump if necessary. He

wasn't looking for collisions. He said "we had several occasions." He was looking for a washout at that very time and place. And let us suppose that Rocco, coming slowly into the blind curve from his end, had arrived at the washout concurrently with the train, and had thus met his death by the train's derailment. Could there then be any doubt, that the motorman's speed on that curve under the conditions that day was negligently excessive? Then the same speed under the same conditions, was not one whit less negligent because it happened that there was no washout there, only Rocco looking for a washout.

It is a fair inference then of fact that the motorman drove his train as one committed to the policy of rushing dangerous spots on a dangerous day rather than to the policy of one using due care under the circumstances. This method of operation, coupled with the motorman's knowledge, actual or constructive, of Rocco's presence, or the likelihood of his presence, in that very dangerous spot because of his important duties that day raised a common law duty to warn Rocco adequately and in time by the simple *means that the engineer had at hand, namely the whistle.*

We quote from Kreigh v. Westinghouse, C. K. & Co., 214 U. S. 249:

> "Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance *or unsafe place to work*, where it is only a *matter of using due skill and care to make the place and appliances safe.* There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64." (Italics ours)

The extreme lateness of the train (over 3 hours) which killed Rocco, is a sufficiently important element, standing by itself, to raise the duty to warn by whistle those em-

ployees lawfully on the tracks. Blanchard v. D. L. & W. R. R. 211 N. Y. 79. McAuliffe v. New York C. R. R. 172 Ap. Div. 922.

It is no answer to say that at common law Rocco might have been guilty of contributory negligence. It is no answer to say that under the Federal Employers' Liability Act Rocco assumed the increased risk of this extraordinary method of operation. We quote from Mr. Justice Pitney, writing for this Court, in Chesapeake & Ohio v. Proffett, 241 U. S. 462:

"But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee without warning to unusual dangers *not normally incident* to the employment is itself an act of negligence." (Italics ours)

It is of the very essence of this specification that the motorman operated the train, under the unusual and abnormal conditions prevailing that day at that point in a highly reckless, unusual, abnormal and extraordinarily dangerous manner as to speed without warning to Rocco.

The jury's finding of negligence against the defendant on this score is founded on amply sufficient evidence and should not be disturbed or set aside as a matter of law.

And finally we claim that in establishing the negligence of the defendant in respect to the failure of the motorman to sound the whistle adequately to warn Rocco as a proximate cause of his death, the jury were entitled to consider all the grounds above specified *together*. We quote from an opinion of the Court in Union Pacific v. Hadley, 246 U. S. 330,:

"On the question of negligence, the defendant undertook to split up the charge into the items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general

question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of negligence."

The Court in the above case stated that it would refuse to disturb *any finding* that was *possible on the evidence.*

POINT III.

The doctrine of Chesapeake & Ohio v. Nixon should be limited to cases of clear view and ordinary operation of train and where there is no proof of the violation by the defendant of the established rules or custom or other unusual circumstances which alter the reasons and logic underlying the rule.

Chesapeake & Ohio v. Nixon is based upon two simple, but very general, statements—(1) is that the engineer and fireman owed no duty to the decedent to keep a look out, and as a corollary to that, decedent took the risk; (2) is that the decedent must rely on his own watchfulness, and as corollary to that, that the railroad company was entitled to expect that self-protection from its employees.

Examination of the facts before the Supreme Court of Appeals of Virginia, 140 Va. 351, discloses that there was ample opportunity for vision, as much as 2000 feet, that the day was clear; that the decedent was proceeding away from the train and was hit from the rear by a freight train traveling 25 miles an hour while decedent was on a three-wheeled velocipede traveling at the maximum 8 or 9 miles an hour. The engineer and fireman were not on the lookout and were unaware that an accident had happened. It thus appears that the decedent had ample opportunity for self-protection by merely looking back, when looking would have prevented the accident. There was nothing unusual about the train's operation, or the day, or the straight track, or

the opportunity of vision. There was some wind blowing against the train.

Examination of the facts and opinions in the cases upon which the Nixon case is based shows that the doctrine is founded upon the premise of *ordinary operation* of trains on straight tracks where the track worker has an equal opportunity to avoid the danger through sight or hearing, or cases where the engineman has violated no *rule* or *custom* expressly fixed, a duty to warn by whistle or otherwise.

In Aerkfetz v. Humphreys, 145 U. S. 418, it appeared in the opinion of Mr. Justice Brewer that the tracks were straight; that the plaintiff stood with his back to the approaching cars, without turning to look; that the cars were moving at a slow rate of speed, no greater than customary; that by ordinary attention he could have observed the cars; that he had an abundance of time to avoid the cars; that there was no reason for the engineer to expect that the plaintiff would pay no attention to his own safety, that ordinary attention on the part of the plaintiff to the ordinary business of the yard would have made him aware of the approach of the cars. The Court said:

"It cannot be that, *under these circumstances*, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employees, who had, all the time, knowledge of what was to be expected. We see in the facts so disclosed no negligence on the part of the defendants, and if by any means, negligence could be imputed to them, surely the plaintiff, by his negligent inattention, contributed directly to the injury." (Italics ours)

In *Connelley v. Pennsylvania R. R. Co.*, 201 Fed. 54, Court of Appeals, Third Circuit, a track walker was killed by a train being backed into Broad Street, Philadelphia. The train had on the rear platform a brakeman to give warning by shouting or whistling. The brakeman did not see Connelley owing to a cloud of steam enveloping him. Judge Buffington writing for the Court said that track walkers are subject to great risks, that for self-protection they must

assume the risks "so long as the defendant, railroad, used the terminal tracks by running its trains properly thereon *in the usual way.*" (Italics ours)

It appeared that track walkers were sent out in pairs, that decedent's mate called his attention to the steam and advised him to move away, and that Connelley failed to heed the warning, which was what cost him his life.

In *Davis v. Philadelphia & R. R. R.*, 276 Fed. 187, it appeared that the track walker was killed by a train, striking him from behind, though the train could have been *seen* when 2200 feet away. It also appeared that the train was operated in the *usual manner.* The Court said on page 188 and 189 of the opinion:

"There was no violation of a statutory requirement, nor was there failure of compliance with *any orders or recognized custom* or rule adopted for the safety and protection of employees * * * * nor could it be held that since in order to constitute negligence, such conduct must be regarded as unusual and consequently not assumed, though it has been held that a railroad track walker * * * * * * assumes the risk of being struck by trains *properly or ordinarily operated.*" (Italics ours)

Thus it is that the foundation of the doctrine of Chesapeake & Ohio v. Nixon is that the track walker through his own faculty of vision or that of his companion (Connelley v. Pennsylvania R. R. Co., supra) may protect himself much easier *under ordinary conditions* than may the engineer protect him. That all the track walker has to do, knowing the danger, is to exercise his faculties and step off the track. Such a risk he properly assumes under *ordinary operating conditions.*

These underlying reasons have been recognized in cases which have followed and limited the Nixon case, both in the Federal Courts and in the Court of Appeals of the State of New York.

Thus in *Norfolk & Western v. Kratzer*, 37 Fed. Rep. 2d Series 522, 6th Circuit, January 1930, Circuit Judge Hicks

in holding a railroad not liable for injuries to the plaintiff, an engine tender who was on the tracks looking for pieces of wooden blocks to put under the drive wheel of his engine, then on a "wye", was run down by a train with electric headlights burning brightly, running 15 miles an hour *"and presumably on schedule."* The engineer and fireman were watching the block signal and did not see the plaintiff. The Court said:

"The *track was straight;* the night was *clear* and *still;* there was nothing to interfere with *plaintiff's vision* and *hearing.* There is *no evidence of any custom to warn or any manner by which warning might have been given."* Under such circumstances, defendant was entitled to expect that plaintiff protect himself. Chesapeake & Ohio v. Nixon, etc. (Italics ours)

In Wyatt v. N. Y. Ont. & Western, 45 Fed. 2d Series, 705, 2d Circuit, December 1930, (certiorari denied 283 U. S. 829) it appeared that a brakeman was out on the track gathering coal for a dug-out fire. Here he was run down by a train backing up without warning. It appeared that there was a rule to sound *the customary* warning by the yard engine when it was about to back down. Circuit Judge Swan said:

"Defendant owed plaintiff same duty of care as though he were directly engaged in moving its cars; and a failure to sound the *customary* signal required by the *rule* was a violation of that duty. It is urged that he voluntarily placed himself in a position of danger with full knowledge that the engine would shortly back down upon track 5, and therefore, was obliged to rely upon his own watchfulness to keep out of its way. *Aerkfetz v. Humphreys,* 145 U. S. 418; Chesapeake & Ohio v. Nixon, 271 U. S. 218; Toledo, St. Louis R. R. Co. v. Allen, 276 U. S. 165. But this Court is committed to the doctrine *that those decisions are inapplicable when the railroad violated its own rule requiring the ringing of the engine bell when the engine is about to move."* (Italics ours)

In Carfello v. D. L. & W. R. R., 54 Fed 2d Series, 475, December 1931, (C. C. A. 2d Circuit), it appeared that a

section man was injured in using a path along the railroad which crossed the track. He was injured by a train. The Court follows the Nixon case, saying:

"So the problem simmers down to whether or not a section man, working on the track of his employer at the point where a known path, used by all who will, crosses that track is entitled to be looked out for or warned of the presence of such engines or trains moving toward him as the employer runs along the track. *As no custom to give any warning to section men at this place was shown* the rights and duties of these parties are controlled by the law as laid down in the case of Chesapeake & Ohio v. Nixon." (Italics ours)

The law declared by the Court of Appeals in another case recognizes that the principles applied in both jurisdictions are the same.

In Fiero v. New York Central R. R., 256 N. Y. 446, (1931), that Court wrote:

"The decisions of the courts of this state as well as those of the federal courts preclude any possibility of affirming this judgment. As early as Chrystal v. Troy & Boston R. Co., 105 N. Y. 164, was formulated a rule that a locomotive engineer, seeing a *person on the track at a time when his train is perfectly visible*, may assume that such person will leave the track in time to escape injury, and *without imputation of negligence, may continue his run until he discovers that the person is heedless of danger.* This rule was repeated and even more strictly applied in O'Brien v. Erie R. Co., 210 N. Y. 96, where we held that an engineer has the right to assume that one whom *he sees* on the track repairing it will leave it in time to escape injury, and that a jury may not infer negligence from the engineer's failure to keep a vigilant outlook, to sound a warning, or to slow down his train when rounding a curve at a speed of fifty miles an hour. Of course, *when violation of a rule or custom* is shown, as in Blanchard v. Delaware, L. & W. R. Co., 211 N. Y. 79, or when there has been an omission by the employer to *establish a suitable system of warning*, the law is

necessarily different, but, in instances where such proof is absent, the doctrine of the Supreme Court is the same as that within our own jurisdiction. Chesapeake & Ohio R. Co., v. Mihas, 280 U. S. 102. *Here there is no evidence that any rule or custom was violated.*" (Italics ours)

But in this case at bar (Rocco v. Lehigh Valley 259 N. Y. 51) when it was before the Court of Appeals, that court wrote on this subject the following only:

"The duty to watch alertly for trains rested on the deceased (Chesapeake & Ohio v. Nixon, 271 U. S. 218)"

We submit, with the utmost respect for our own High Court, that this general statement is error for it implies on the authority of the Nixon case that there is no duty under the special circumstances of this case, on the part of the defendant, to warn Rocco. It fails to give any consideration to the facts and circumstances, necessarily found by the jury, which imposed a duty upon the motorman owing to Rocco to warn. It assumes that the general statements, of the Nixon case have no qualifications, limitations or exceptions within which Rocco could clearly come. The utmost discharge by Rocco of the undoubted duty to "*watch* alertly" for the train, would not have enabled him to *see* around the blind curve in time to save his life.

Moreover, the unique circumstances of this case, proven and accepted by the jury and the Appellate Division, take it out of the doctrine of the Nixon case on several grounds, which, we hope, we have demonstrated.

POINT IV.

Rocco's negligence, if any, was "contributory" and "concurrent" but not "primary" and not within the doctrine of Davis v. Kennedy and Unadilla Valley v. Caldine.

A. Construction in Supreme Court

Frese v. Burlington & Q. R. R., 263 U. S. 1, Davis v. Ken-

nedy, 266 U. S. 147, and Unadilla Valley v. Caldine, 278 U. S. 139, are the cases out of which has arisen a doctrine which we may call that of "primary" and "secondary" negligence. We maintain that the doctrine has no application to the case at bar. But the Court of Appeals in its opinion in the case at bar founded its decision, in part, on Davis v. Kennedy and Unadilla Valley v. Caldine, holding that the "violation of the rule was the *primary* cause of the accident." It therefore becomes necessary to examine the doctrine of those cases (the Frese case, the Davis v. Kennedy case and the Caldine case) in order to determine the application and extent of the doctrine. And for the sake of brevity, we will refer to the doctrine as the "Caldine doctrine" after the last case in the series in this Court.

1. In each of the three cases above mentioned there was a collision between two trains which we will call train "A" and train "B".

2. In none of the three cases was there any negligence claimed as to any employee operating train "B". In two of the cases train "B" was operated by the same owner as train "A", but in the Frese case which involved a collision between two trains at a point where one railroad crossed the other, train "B" was owned by a separate railroad.

3. In all three cases the negligence claimed under the Federal Employers' Liability Act was that of a fellow-employee of the plaintiff who either *participated* in or bore a *direct relation* to the negligent movement of train "A". This participation might be on the part of a fireman or brakeman or conductor or it might be on the part of a station agent who had a direct relation to the movement as in the Caldine case.

On account of this *participation* and *direct relation* to the negligent movement of train "A", the employee who had personal physical control or equal control was held guilty of "primary" negligence and the employee who *participated* by not *preventing* the movement or who was *related* to the

movement in a lesser degree was held guilty of "secondary" negligence.

4. The doctrine is authority for the proposition that one guilty of "primary negligence" cannot recover from the common employer (even under the Federal Employers' Liability Act) on the basis of the "secondary negligence" of his co-employee. The reason for the rule is stated in the Frese case in the following language:

"It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to failure to act as required on the ground that possibly it might have been prevented if those in *secondary relation to the movement* had done more." (Italics ours)

It is at once apparent that the "Caldine doctrine" as laid down by this Court in these three cases has no application to a case where the negligence claimed by the plaintiff as the basis of his recovery is that of the operator of train "B" as it is in the case at bar. For there is lacking in the case at bar both "participation" and "relation" to the same "movement." Rocco's negligence, if any, related to his moving the speeder against a general instruction about first inquiring the "line up." The speeder takes the place of train "A". There is no one in "secondary" relation to that movement of the speeder or that negligent act against whom negligence is claimed.

Rocco's act is "independent" of any negligent act of the motorman. The motorman of train "B" in what he did in controlling the movement of train "B" was also acting independently of any act of Rocco's. He had control of an independent instrumentality of movement. His negligence was separate and distinct and could have no "secondary" relationship to Rocco's negligence, if any. There was no "participation" in the same act of negligence or the same "movement."

Participation in the same accident will not fulfill the requirements of the doctrine, for the accident, as here, may be the result of several independent and concurrent acts of

negligence, which the jury compares and finds damages in proportion as the component acts of negligence bear to the whole damage.

"Primary" and "secondary" negligence as used in the Caldine doctrine properly refers to the relationship of two employees to the same "component" or movement.

We earnestly believe that the Supreme Court should so define the doctrine and that in any event the Court of Appeals was in error in applying the Caldine doctrine to the case at bar.

B. *Have the lower Federal Courts extended or defined the limits of the doctrine, contrariwise to the limits inherent in the three Supreme Court cases above? We think not.*

1. First in importance and lucidity we note: Miller v. Central Railroad of New Jersey, 58 F. (2d), 635, Certiorari denied 53 Sup. Ct. Rep. 18, 1932. This case is a true typical "primary" and "secondary" negligence case. There was involved a train "B", but no one on train "B" was involved in the charged negligence.

But, all the three cases in the Supreme Court the "primary" wrongdoer violated a specific order, devised for a specific occasion. In the Miller case, is laid down the rule that where the decedent or injured plaintiff (who would otherwise be guilty of "primary" negligence) has violated a rule "generally enjoining caution or responsibility" as distinguished from "specific precaution for specific occasions", then the negligent act involved in such violation is one of two "concurring acts of contributory negligence" and not "primary" negligence. (This applies to Rocco's negligence, if any, as brought out in the next point.)

2. *Slocum v. Erie R. R. Co.*, 37 Fed. (2d) 43, and *Bradley v. Northwestern Pacific*, 44 Fed. (2d) 684, were true typical "primary" and "secondary" negligence cases. They require no further comment.

3. *Southern Railway v. Hylton*, 37 Fed. (2d) 843, was a

case of dismissal because the alleged negligence of another servant was not proven at all. This case is of a type with *Great Northern v. Wiles*, 240 U. S. 444. There was no negligence in the case except the plaintiff's. The Caldine doctrine is therefore entirely inapplicable.

4. In *Reynolds v. Ont. & Western*, 42 Fed. (2d) 164, it appeared that a backing train collided with a speed car and injured Reynolds who was on the speed car with his back to the colliding train. Eastwood, his mate on the speed car, was occupied tinkering with the motor. The negligence claimed was that of Eastwood, the mate of Reynolds, in not keeping a look out ahead *and* that of the flagman of the backing train who failed to go back to warn or protect the rear of the train. It will be noted that as to the negligence of Eastwood, the mate of the plaintiff on the speeder, the Court considered, properly we think, that the Caldine doctrine did apply. The Court said in this connection:

"The question whether intestate's neglect, if under duty to act, was the primary cause of the collision may involve difficult considerations of law and fact, which we do not pass upon on the present record."

As to the negligence charged against the trainman who did not "protect" the backing train (the equivalent of train "B" of our type and the equivalent of the motorman of the passenger train in the Rocco case) neither the Court nor the counsel attempted to apply the Caldine doctrine. If the Caldine doctrine had been applied to the negligence of the flagman of the backing train (train "B"), then this case would have furnished a precedent for what the Court of Appeals said in the Rocco case. But in the Reynolds case the Circuit Court of Appeals of the Second Circuit properly applied the Caldine doctrine to the two employees on the speeder and properly failed to apply the Caldine doctrine to the employee on train "B". As to the duties owing between employee of train "B" and the speeder the Court applied Chesapeake & Ohio v. Nixon, i. e., that under ordinary circumstances there is no duty on the part of the train to look

out for a hand car. This doctrine is treated elsewhere in this brief.

The same Court which decided the Reynolds case in 1930, criticized the Reynolds case in 1932 in the Miller case, supra, but not in respect to the application of the doctrine of the Caldine case to this particular state of facts.

5. Paster v. Pa. R. R., 43 Fed. (2d) 908 has only the appearance of a departure from the Caldine doctrine. There a standing car on which Paster was working (which we will call train "A") was backed into by a string of cars (which we will call train "B"). Paster was injured. The claimed negligence was the neglect of an employee called Sullivan who allowed the movement of train "B" after he had promised plaintiff to prevent this. Sullivan is therefore related to the movement in a secondary way within the Caldine doctrine. He was a "participant" just as was the station agent in the Caldine case. We do not think the case a departure from or an extension to the Caldine doctrine as defined in this Court.

6. Erie R. R. Co. v. Irons, 48 Fed. (2d) 60 involved no collision and is not a typical "primary" and "secondary" case and was not treated by the Court as such; in fact the Court confirmed the refusal of the Trial Court to direct a verdict for the defendant based on Davis v. Kennedy holding that such a course, the Court said, would be inconsistent with submitting the issue of defendant's negligence to the jury. It will be seen then that the attempted application of the Caldine doctrine in the Irons case was refused.

7. In the Dibble case, 31 Fed. (2d) 239, (Writ denied 280 U. S. 565), Dibble, the motorman, imputed negligence to Caldine, the conductor, on the same accident involved in the Caldine case. Caldine, in the Caldine case, charged negligence to Dibble, and the Court held that as to the employer each, in his separate case, was guilty of "primary" negligence. The inherent elements had not changed in anywise.

C. *The Court of Appeals was in error in applying the Caldine doctrine to the case at Bar.*

To apply the Caldine doctrine to the Rocco case is entirely unwarranted on the facts as a matter of law, because in the case at Bar there is lacking the essential elements of "participation" and "relation to the negligent act". Rocco was contributorily negligent or he was not. There is no one "secondarily" liable. The motorman of train "B" was either negligent for an independent act of his own, which contributed to the accident or he was not.

As a matter of law then the case was properly submitted to the jury and no warrant exists as a matter of law on this score to take the case from the jury's consideration.

To apply the Caldine doctrine to this case, would be to empty the Federal Employers' Liability Act of its meaning. See Hadley v. Union Pacific R. R., 246 U. S. 330. That act is to be liberally construed. See Jamison v. Encarnacion 281 U. S. 635.

D. Even if the Caldine doctrine were otherwise applicable Rocco's negligence, if any, was "contributory" and not "primary" for the reason pointed out in the Miller case which is treated in the next point.

POINT V.

Decedent had a positive duty to inspect and repair during certain hours regardless of late trains; especially dominating was this duty on December 8, 1927, on account of washout conditions.

General ORAL instructions to decedent to inquire, before going out on the line, (twice a day before 6:30 a. m. and before 3:30 p. m.), **as to the location of trains enjoined a general caution, the violation of which might be contributory negligence; but such oral instructions did not constitute a specific precaution, for a specific occasion, the violation of which might constitute an assumption of risk as a matter of law.**

A. The evidence in the light of the jury's verdict fairly establishes

(a). That the instruction had been given for 6 years to track inspectors, but had not been promulgated in the Rule Book.

(b). That the instruction was general, and not for any specific train.

(c). That the instruction was not rigid but was "lived up to in a certain respect." (R. 128).

(d). That the inquiry was usually made orally before leaving Ithaca at 6:30 a. m. and 3:30 p. m. but the information could be acquired from other employees who had it. (R. 129, 130).

(e). That generally through Rocco's section there were but two passenger trains each day (four passages) and a freight train down and back three times a week, Tuesday, Thursday and Saturday (R. 21) and a pick-up train to Ludlowville and back (R. 33, 34). The accident happened on a Thursday.

(f). The day previous to the accident, the wind had been blowing hard, piling the water up towards the track (R. 61).

Day of the Accident.

(g). The day of the accident, a wreck train containing decedent's son had gone out early to repair washouts (R. 34).

(h). The freight train from Auburn did not get through (R. 158).

(i). The passenger train from Auburn had no schedule that day (R. 104). The train dispatcher could tell only what station it passed but not when it would reach the next station (R. 104).

(j). The telegraph operator at Ithaca did not call the train dispatcher for information about trains that day (R. 158, 159).

(k). Rocco did not ask telegraph operator at Ithaca for information that afternoon (R. 122).

(l). The knowledge of conditions along the line with the wreck or work train out with Rocco's son on it, and the passenger train not in at noon, were known to the employees and presumably to Rocco (R. 129, 130). He had made his morning tour.

Rocco's Duty.

Rocco, exercising his judgment, may have considered it unnecessary and superfluous to make inquiries in view of what he knew of conditions. He was facing no prohibition against going out. The fact is just the contrary. He had to go out under all conditions.

(m). Rocco was bound to go out "on his usual time" (R. 99) whether the trains ran on schedule or not (R. 100).

(n). These very conditions of the track that day were the reason he was put there to patrol and inspect and repair (R. 99, 108).

(o). Perhaps there was some negligence in not walking over to the station to make superfluous inquiries (as it may have seemed to him that day) but he was a faithful worker of twenty years' experience on this line and he knew his calling and his duty. He went where his work was.

The jury has measured his negligence on the "comparative rule," and apportioned the damage. The question here, is, was his negligence merely contributory, or was it such a sole proximate cause as to preclude any recovery, *as a matter of law.*

B. We regard a recent decision as disposing of this branch of the case. We refer to Miller v. Central R. R. of N. J. 58 Fed. 2d Series, 635, (C. C. A. 2—May 1932) Certiorari denied 53 Sup. Ct. Rep. 18., in which it appeared that a "work extra" engineer, obeying conductor's order to proceed to next station, *without receiving a copy of running order,* collided with a freight train. The question was whether the violation by the decedent of the rule relative to an engineer remaining responsible for the safety of his train, was contributory merely or rendered him "primarily" responsible as a matter of law.

The Court said: "We assume for argument that he was negligent in this last respect, and that except for the statute the plaintiff could not recover. But it seems to us that the situation involved two *concurring acts of contributory negligence,* and was not one where the employee has disobeyed a rule and is "primarily" responsible. Frese v. Chicago B. & O. R. Co., 263 U. S. 1, Unadilla Valley R. Co. v. Caldine, 278 U. S. 139, Unadilla Valley R. Co. v. Dibble, 31 F. 2d Series 239, (C. C. A. 2), Certiorari denied 280 U. S. 565, Bradley v. Northwestern Pac. R. Co. (C. C. A. 9), 44 F. 2d Series 683. All these decisions involved *specific precautions for specific occasions;* the stopping of a train at a given

spot until another passed, or until the track was clear. No doubt the doctrine is not confined to train movements, (Paster v. Pa. R. R. 43 F. 2d Series 908), but it does not seem to us to extend to rules *generally enjoining caution, or responsibility,*—in spite of some of our language looking to the contrary in Reynolds v. New York O. & W. R. Co. 42 F. 2d Series 164. If it did, an employer could revive the defense of contributory negligence by imposing as an affirmative duty such care as is appropriate to the situation, which is just what the common law made a condition upon recovery. The statute was designed to end that defense and cannot be so conveniently avoided; the doctrine does not, in our judgment, apply except when *more definite commands* are given to *meet more definite situations;* how definite we need not decide. * * * * Thus we think the situation at bar was the usual one of contributory negligence only." (Italics ours).

POINT VI.

Decedent did not assume the risk as a matter of law.

A. *As to plaintiff's negligence.*

We have shown above that decedent did not "assume the risk" as a matter of law within the doctrine of Chesapeake & Ohio v. Nixon, because that class of cases is inapplicable, on assumption of risk, as a matter of law, where there is a rule or custom or an extraordinary danger from defendant's negligence not normally incident to the employment.

Norfolk & Western v. Kratzer, supra
Wyatt v. New York, Ont. & W. R. R., supra
Carfelo v. D. L. & W. R. R., supra.

Such negligence, if found, was independent and contributory only. It was for the jury to measure its extent.

Miller v. Central R. R. of New Jersey, supra.

B. *As to Defendant's negligence.*

Decedent assumed only the ordinary risk and not the extraordinary risk of the extraordinary operation as to speed without warning under all the conditions.

Chesapeake & Ohio v. Proffett, supra

New York Central R. R. v. Marcone, supra

Kreigh v. Westinghouse, C. K. & Co., supra.

C. *Risks not assumed without awareness.*

The burden of proof that the decedent assumed any particular risk was on the defendant and the defendant cannot sustain the burden without showing, what is not shown here, that the decedent *was made aware* of the dangerous speed and the lack of a commensurate warning *before* he can be held to have assumed the risk thereof.

In Chesapeake & Ohio v. De Atley, 241 U. S. 310, the Court said:

> "The plaintiff had the right to presume that the engineer would exercise reasonable care for his safety and cannot be held to have *assumed the risk* attributable to the operation of the train at an unusually high and dangerous rate of speed, *until made aware of the danger,* unless the speed and the consequent danger were *so obvious* that an ordinary careful person in this situation would have observed the one and appreciated the other."

In Director General of Railways v. Templin, 268 Fed. 483, discussing the law of extraordinary dangers, the Court said:

> "In this case we think *no one but the jury* could say whether Templin, in assuming that his employer would protect him by the customary warning in the circumstances, *saw or should have seen,* the *extraordinary danger arising from his employer's negligence in not giving the warning,* and whether, accordingly, Templin did or did not assume the risk thereof." (Italics ours)

Conclusion.

For the reasons assigned in the Petition for the Writ of Certiorari and because of the facts and the law set out in the Brief accompanying said Petition and in this Brief on the Merits on the Writ, we respectfully submit that after full consideration by this Court, the judgment and decision of the Court of Appeals of New York herein should be reversed and the judgment of the Trial Court be reinstated.

Respectfully submitted.

ABRAHAM W. FEINBERG,

Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED, PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

HOWARD COBB,
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Counsel for Lehigh Valley Railroad Company, Respondent.

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I.

Statement of Case.

This action was brought under the authority of the Federal Employers' Liability Act. One Joseph Rocco was killed while engaged in his employment for the Lehigh Valley Railroad Company.

The decedent was employed as a track inspector on a branch of defendant's railroad running between Auburn, N. Y., and Ithaca, N. Y. Ithaca, N. Y., is the

south terminus of the branch. His duty was to inspect the track twice each day from Ithaca, the south terminus of the branch, to the end of the Ithaca section, about seven and a half miles north of Ithaca. He had been employed by the Lehigh Valley Railroad Company for between twenty and twenty-five years (R. 20). He covered his assigned section by means of a three wheeled vehicle known by railroad men as a "speeder." The speeder is a three wheeled vehicle operated by foot and carries equipment for making minor repairs along the tracks. It is built so that it can be readily picked up and removed from the tracks (R. 113).

The branch of the railroad upon which the decedent worked runs along the shore of Cayuga Lake and in stormy weather the track is subject to washouts (R. 95, 96). The primary purpose of his work was to protect the two passenger trains a day which traverse the branch line, two in each direction, between Auburn and Ithaca.

He preceded each passenger train in each direction. At the time the decedent met his death, a train left Ithaca at 7:40 o'clock in the morning for Auburn. On its return trip it arrived in Ithaca at 12.23 P. M. It departed again for Auburn at 4:55 P. M. and returned to Ithaca from Auburn at 8:30 P. M. (R. 21). The decedent's schedule was as follows: He left Ithaca at 6:30 in the morning and proceeded north to the end of his assigned track. He returned to Ithaca at 12 o'clock, went out again at 3:30 in the afternoon and came in at 8 o'clock at night (R. 20, 43, 44). It thus appears that he preceded by a short time the passenger trains running in each direction.

On the Auburn and Ithaca branch, in the latter part of October or early part of November, 1920, there was promulgated a rule that track walkers should not

occupy the main track with speeders or any other obstructions, without first ascertaining from the operator the whereabouts of the approaching trains in both directions (R. 163). The decedent was specifically and repeatedly instructed as to the rule and warned against infractions thereof (R. 111, 112, 115, 123, 124, 147, 148). His predecessor, in the year 1921, had received the same instructions (R. 49). On the day the decedent was killed, December 8, 1927, there had been heavy washouts on the Ithaca-Auburn branch. They occurred all along the line by reason of heavy storms (R. 34, 35, 169). By reason of the washouts the train southbound from Auburn to Ithaca, due to arrive in Ithaca at 12:23 P. M., was delayed and reached Ludlowville, N. Y., the last reporting station prior to reaching Ithaca, at 3:14 P. M. (R. 150). Ludlowville is eight miles north of Ithaca (R. 155).

On that day Rocco left Ithaca at 3:30 P. M. without making inquiry as to the whereabouts of the train (R. 122, 123). He collided with the train at a point approximately 663 feet north of the highway crossing leading into Stewart Park in the City of Ithaca. He was struck by the train due in Ithaca at 12:23 and was killed (R. 64, 78). After stopping because of the accident, the train proceeded to Ithaca and arrived in Ithaca at 4 P. M. (R. 151).

All the facilities of the railroad were afforded the decedent for his protection from trains (R. 124, 125). Had Rocco inquired of the dispatcher he would have been informed that the train which struck him had left Ludlowville, eight miles north of Ithaca, at 3:14 P. M. (R. 155). It would then have been left to Rocco himself to determine at what time he wanted to leave the station to clear this train (R. 125).

II.

ARGUMENT.

A. The violation by the decedent of the rule requiring him to ascertain the location of trains before putting his speeder on the track, was the primary cause of the accident and the sole proximate cause thereof.

In addition to the rule which required the decedent to make inquiry regarding any trains which he might encounter, there was another rule of the railroad governing the conduct of the decedent. Rule 823, promulgated by the Lehigh Valley Railroad Company provided as follows:

> "Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time, on any track, in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train" (R. 245, 246).

Thus, under the rules governing the decedent's employment, trains had superior rights on the tracks and the decedent's rights were subordinate. Under the decedent's contract of employment, it was his duty to give to trains upon the track the right of way, and his was the primary duty of avoiding a collision. Every communication facility of the railroad was afforded him for his protection.

The only issue upon the trial regarding the contributory negligence of the decedent was in respect to his failure to ascertain the whereabouts of the trains before proceeding upon the track with his speeder, and his resulting failure to be "clear of the track." The jury

found the decedent guilty of contributory negligence, assessed plaintiff's damages at $12,096, and, pursuant to the provisions of the Federal Employers' Liability Act, reduced plaintiff's damages by 40% because of the contributory negligence of the decedent. This, upon the issues as tried, despite the absence of a special verdict, was tantamount to a finding by the jury that the decedent violated the existing rule requiring him to ascertain the location of the trains before occupying the track. The Court of Appeals of the State of New York has, following the State and Federal authorities, determined that the violation of said rule constituted the primary and sole proximate cause of decedent's death.

The plaintiff relied solely upon a claim of negligence on the part of the engineer of the train which collided with Rocco as a basis of her cause of action. It was claimed that his neglect was a failure to give a warning signal. No negligence of any other officer or employee of the railroad was claimed. If we examine the respective duties of the engineer and of the decedent in the light of existing rules which guided those employees, no other conclusion can be drawn except that Rocco's negligence was not only the sole proximate cause of his death, but that no evidence of any kind supports any finding of negligence on the part of the engineer of the train which collided with him.

It is urged by the petitioner that the Court of Appeals of the State of New York is in error because, to support its determination, there must have been an absolute written prohibition against his occupying the track with his speeder. That such a rule existed, and that Rocco violated it, is supported by the verdict which found that the decedent was guilty of contributory negligence (R. 1). The record abounds with undisputed testimony that there was such a rule, that Rocco was instructed upon it and was warned against its

violation (R. 111, 112, 115, 123, 124, 147, 148, 163). If any explanation be necessary as to why it was not printed in the general rule book, the explanation is that on no other part of the system was such vehicle used (R. 95). A general rule of like import respecting the use of motor vehicles was promulgated and printed (R. 165, 166).

The petitioner also argues that a freight train having left Ludlowville at 2:30 P. M. and not having arrived at Ithaca at 3:30 P. M., the decedent, had he inquired and ascertained such fact, would have been justified in believing that both trains were held up by washouts in his patrol section. This argument is based on assumptions contradicted by the facts. The distance from Ludlowville to Ithaca is eight miles. The decedent's patrol section extended from Ithaca towards Ludlowville a distance of seven and a half miles (R. 20). He had thus returned at 12 o'clock noon on the day he was killed, from his inspection trip to a point within a half a mile of Ludlowville, and knew the fact to be that there were no washouts in his patrol section. In fact, on the day he was killed, Gabriel Rocco, his son, was engaged with a gang repairing washouts, and when the train which killed the decedent passed the gang in which Gabriel Rocco was working, the tracks had been repaired to Kings Ferry (R. 35, 40, 41). Kings Ferry is two stations north of Ludlowville (R. 150). It would be equally inferable that had Rocco gone to the dispatcher's office he would have been informed that there were no washouts between Ludlowville and Ithaca.

Rocco well knew that the pickup freight, which had left Ludlowville at 2:30 P. M., had other work to do on its return trip to Ithaca and had no particular schedule (R. 33). The pickup had switching to do at Ludlowville and Portland Point. Portland Point is

between Ludlowville and Ithaca, about one mile south of Ludlowville (R. 161). The decedent, having worked for the Lehigh Valley Railroad Company for twenty-five years, and well knowing that the pickup freight had switching work to do at Portland Point after leaving Ludlowville, certainly knew, or had reason to know, that its failure to arrive in Ithaca prior to 3:30 was not the result of any washout.

It is submitted that upon the facts, the only conclusion to be drawn is that the decedent realizing that a train on schedule time would not be encountered by him, failed to take the precaution which he would have taken had he acquainted himself with the fact that the train that killed him was late. It can readily be seen that had Rocco made inquiry, he would not have started on his trip until he had given the train which had left Ludlowville at 3:14, sufficient time under its regular run schedule, to reach Ithaca. That train, after having been delayed because of the accident, reached Ithaca at 4 o'clock and struck Rocco about 3:30 P. M., when he was still in the City of Ithaca. It takes but little computation to determine that the train would have cleared Rocco's patrol section within about five minutes after Rocco started out. Inquiry would have informed him of the fact that in that short time the train would have cleared.

B. The law is well settled that under the facts disclosed in the case at bar, there can be no recovery under the Federal Employers' Liability Act.

What the respective duties of the engineer and the decedent were with respect to the use of the track, has been discussed above. In general terms, under the rules under which the employees worked, and upon which both had a right to depend, Rocco's duty was to avoid

trains which might be on the track, and the engineer's duty was to proceed in reliance upon that rule and to refrain only from wilfully running down Rocco.

It may be stated here that the plaintiff's only claim of negligence on the part of the engineer was his failure to blow a whistle warning Rocco. It will appear from pages 11 and 12 of petitioner's brief that the petitioner advances two reasons why the engineer was under a duty to signal. They are as follows:

1. A rule of the Lehigh Valley Railroad Company not quoted by the petitioner, the substance of which is misstated in petitioner's brief.

2. A common law duty on entering blind curve, to signal where the engineer knew, or should have known, men might be at work.

In dealing with the rule in question, for the purpose of clarity in the record, the respondent here sets forth the language contained in the petitioner's brief wherein the petitioner purports to set forth its substance.

> *"The plaintiff introduced in evidence a written rule of the defendant requiring the engineer when approaching curves and other points where employees may be at work on tracks or bridges, or when approaching highway crossings or running against the current of traffic, to sound short blasts of the whistle"* (R. 54). Italics ours. (Petitioner's brief, pages 11 and 12).

The rule introduced at page 54 of the record which the petitioner purports to state in substance, is of entirely different import. The rule in question is rule 14, Subdivision d, paragraph q. The symbol "O" signifies a short blast of the whistle, and the symbol "——" a long blast. Section 14 of the rule book contains many subdivisions and treats with the signals

to be given by the engineer under various conditions and circumstances. The exact language of the rule is as follows:

> "O——O. Running against the current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signal and approaching curves and other points where employees may be at work on track or bridges" (R. 54).

Thus the rule provides that when a train is running against the current of traffic, under certain circumstances and conditions, three blasts of the whistle must be blown, first a short blast, then a long blast, and then another short blast.

The Ithaca branch is a single track road (R. 162). The rule being printed in the rule book in bold face type, on its face does not apply to single track roads (R. 162). It is common knowledge that the expression "running against the current of traffic" applies only to running trains on double track roads in a direction opposite to the customary flow of traffic. The rule is certainly inapplicable and negligence cannot be charged to the engineer by virtue of it. Furthermore, as will appear from the argument herein, the engineer had no right to expect Rocco to be in occupation of the track.

In discussing the petitioner's theory that at common law, ordinary care on the part of the engineer required him to give a warning signal upon approaching the curve in question, it may be clearly demonstrated that the case at bar falls definitely within the doctrine of *Unadilla Valley Railroad v. Caldine,* 278 U. S. 139.

Upon the undisputed evidence and by the finding of the jury, Rocco had violated a rule promulgated for his own safety. He had neglected to provide himself

with information which was available to him, which he was required to obtain, and from which he could have ascertained the location of the train and protected himself accordingly. As a result thereof he placed himself in a position of danger on the track beyond a curve around which the train was approaching. The engineer had no knowledge and was not bound to infer or presume that Rocco would disregard the rule and thereby disregard his duty to avoid oncoming trains. There was no duty upon the engineer to assume that Rocco or any other employee would violate his duties and place himself in danger. To impose upon the engineer a legal obligation to give a warning to Rocco, who, by virtue of the rules under which he was employed, was required not to be on the track, and was required to inform himself of the locations of trains and stand "outside and clear of the track," would be violative of the doctrine of the *Caldine* case and every case of similar character upon which this Court has written, and of all reported decisions of the State and Federal Courts.

The case clearly falls within the well established rule that a recovery may not be had under the Federal Employers' Liability Act where a plaintiff places himself in a position of danger by his own negligence and violation of the rule of his employment because some other person did not anticipate his negligent act and act to prevent injuries because thereof.

Davis, Agent, v. Kennedy as Administrator, 266, U. S. 147.

Great Northern Railroad Co. v. Wiles, 240 U. S. 444.

Southern Railway Co. v. Gray, 241 U. S. 333.

Frese v. C. B. & Q. R. R., 263 U. S. 1.

Unadilla Valley Railway Co. v. Caldine, 278 U. S. 139.

The case falls specifically within the facts and the doctrine pronounced by this Court in *Chesapeake & Ohio R. R. Co. v. Nixon,* 271 U. S. 218. The cases are indistinguishable as to the conduct of the respective plaintiffs. In the *Nixon* case the train came from behind, overtaking and colliding with a similar vehicle on a straight stretch of road. The jury found that the engineer was not on the watch and this Court deemed itself bound by that finding. This Court said:

> "If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

In the case at bar, there is no claim that the engineer was not watching and a search for the engineer's negligence discloses nothing more than his failure to anticipate that Rocco might have been negligent and warn him if he was. It is submitted that no case could fall more closely within those cases decided by this Honorable Court which guided the Court of Appeals of the State of New York, than the case at bar. The engineer of the train which struck Rocco was entitled to expect that Rocco would use the means of self-protection given to him and avoid placing himself in a position of danger.

No better summary of the law of the case may be made than by quoting the language of Mr. Justice Davis of the Supreme Court, Appellate Division, Third Department, of the State of New York, when the case at bar was considered by that Court.

"There is nothing to indicate that there was any duty on the part of the engineer to give a signal at the point where the accident occurred, or that the decedent relied on such a signal. The latter went forth without vital information he might readily have obtained, and the unfortunate accident followed as a result of that primary cause. The burden of responsibility may not so easily be shifted to another by saying that the engineer should have given a whistle signal before rounding the curve, and therefore comparison may be made between negligent acts."—(R. 261.)

Conclusion.

It is respectfully submitted that the record in this case shows conclusively that no question of law is involved requiring the granting of the petition herein. No undetermined or peculiar question arises under the provisions of the Federal Employers' Liability Act.

No federal question of substance not heretofore determined by this Court was raised or involved in the trial of the action. Nothing was decided in the State Court in any manner not in accord with the applicable decisions of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

HOWARD COBB,
HAROLD E. SIMPSON,
Counsel for Lehigh Valley Railroad Company, Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 358

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,

Plaintiff-Petitioner,

against

LEHIGH VALLEY RAILROAD COMPANY,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK.

HOWARD DORE,
HAROLD S. SIMPSON,
Counsel for Lehigh Valley Railroad Company,
Defendant-Respondent.

File No. 37,055

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,

PLAINTIFF-PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY,

DEFENDANT-RESPONDENT.

BRIEF OF LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT-RESPONDENT.

I.

Statement of Case.

This action was brought under the authority of the Federal Employers' Liability Act. One Joseph Rocco was killed while engaged in his employment for the Lehigh Valley Railroad Company.

The decedent was employed as a track inspector on a branch of defendant's railroad running between Auburn, N. Y., and Ithaca, N. Y. Ithaca, N. Y., is the south terminus

of the branch. His duty was to inspect the track twice each day from Ithaca, the south terminus of the branch, to the end of the Ithaca section, about seven and a half miles north of Ithaca. He had been employed by the Lehigh Valley Railroad Company for between twenty and twenty-five years (R. 20). He covered his assigned section by means of a three wheeled vehicle known by railroad men as a "speeder." The speeder is a three wheeled vehicle operated by foot and carries equipment for making minor repairs along the tracks. It is built so that it can be readily picked up and removed from the tracks (R. 113).

The branch of the railroad upon which the decedent worked runs along the shore of Cayuga Lake and in stormy weather the track is subject to washouts (R. 95, 96). The primary purpose of his work was to protect the two passenger trains a day which traverse the branch line, two in each direction, between Auburn and Ithaca.

He preceded each passenger train in each direction. At the time the decedent met his death, a train left Ithaca at 7:40 o'clock in the morning for Auburn. On its return trip it arrived in Ithaca at 12:23 P. M. It departed again for Auburn at 4:55 P. M. and returned to Ithaca from Auburn at 8:30 P. M. (R. 21). The decedent's schedule was as follows: He left Ithaca at 6:30 in the morning and proceeded north to the end of his assigned track. He returned to Ithaca at 12 o'clock, went out again at 3:30 in the afternoon and came in at 8 o'clock at night (R. 20, 43, 44). It thus appears that he preceded by a short time the passenger trains running in each direction.

On the Auburn and Ithaca branch, in the latter part of October or early part of November, 1920, there was promulgated a rule that track walkers should not occupy the main track with speeders or any other obstructions, without first ascertaining from the operator the whereabouts of the approaching trains in both directions (R. 163). The decedent was specifically and repeatedly instructed as to the rule and warned against infractions thereof (R. 111, 112, 115, 123, 124, 147, 148). His predecessor, in the year 1921,

had received the same instructions (R. 49). On the day the decedent was killed, December 8, 1927, there had been heavy washouts on the Ithaca-Auburn branch. They occurred all along the line by reason of heavy storms (R. 34, 35, 169). By reason of the washouts the train southbound from Auburn to Ithaca, due to arrive in Ithaca at 12:23 P. M., was delayed and reached Ludlowville, N. Y., the last reporting station prior to reaching Ithaca, at 3:14 P. M. (R. 150). Ludlowville is eight miles north of Ithaca (R. 155).

On that day Rocco left Ithaca at 3:30 P. M. without making inquiry as to the whereabouts of the train (R. 122, 123). He collided with the train at a point approximately 663 feet north of the highway crossing leading into Stewart Park in the City of Ithaca. He was struck by the train due in Ithaca at 12:23 and was killed (R. 64, 78). After stopping because of the accident, the train proceeded to Ithaca and arrived in Ithaca at 4 P. M. (R. 151).

All the facilities of the railroad were afforded the decedent for his protection from trains (R. 124, 125). Had Rocco inquired of the dispatcher he would have been informed that the train which struck him had left Ludlowville, eight miles north of Ithaca, at 3:14 P. M. (R. 155). It would then have been left to Rocco himself to determine at what time he wanted to leave the station to clear this train (R. 125).

POINT I.

The evidence is insufficient in law to support a verdict for the plaintiff.

Section 457A of the Civil Practice Act of the State of New York provides as follows:

> "The Judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence."

This court has held that it will examine the record and if it is found as a matter of law that the evidence is not sufficient to sustain a verdict it will reverse.

C. M. & Ct. P. Railway Co. v. Coogan, 271 U. S. 472, 474.

Whether the Court of Appeals of New York has held that a verdict should have been directed pursuant to section 457A of the Civil Practice Act or whether it has reversed the judgment for the reason that the evidence is insufficient in law to sustain a verdict for the plaintiff, and without regard to whether this court gives consideration to whether a verdict should have been directed under the procedure in vogue in New York, or considers the case with a view to determining whether the evidence as a matter of law fails to sustain the verdict for the plaintiff, it is submitted that a verdict for the plaintiff is not warranted in the light of the applicable decisions of this court.

The evidence as a matter of law

A. Will not warrant a finding of negligence on the part of the defendant.

B. Conclusively charges the decedent with negligence which was the primary and sole proximate cause of the accident.

C. Conclusively charges the decedent with having assumed the risk of the accident which caused his death.

The submission of the case to, and the verdict by, the jury was based entirely upon alleged negligence of the engineer in failing to sound a whistle for the benefit of the decedent upon approaching a curve beyond which his view was obstructed. Plaintiff-Petitioner's counsel assumes that by the verdict, the failure to signal is established as a fact in this case. Respondent urges that even though no such duty existed as respects the decedent, the evidence is insufficient in law to warrant a finding that timely warning was not given.

One Fred Stevens was the plaintiff's only witness as to signals. He testified that as Rocco came up to him just

prior to the accident, they had a conversation. (R. 61)

The following is the testimony upon which the case was permitted to go to the jury on the question of the defendant's negligence:

"Q. Tell us what if anything, you observed about whistle signals if any occurred on that train.

A. At that time, at that certain time that this happened?

Q. Not what they do other times but this time Fred?

A. I don't think so; I can't recall of any whistle blowing at that time because the first thing I heard. . ." (R. 63)

Cross-examination

"Q. You will swear that he didn't blow this whistle?

A. I didn't hear it." (R. 84)

"Q. But you are willing to swear "I heard the train whistle, I looked up and saw the train and speeder on the track and then the motor car struck the speeder." Did you say that?

"A. I do recall I can safely say that the train whistled at the same time it came around the curve within a question of ten seconds.

Q. Do you recall that you heard the train whistle?

A. I don't know as I really could swear to it because the train does blow at this curve.

Q. If you told it to him on the 10th of December, it must have been right?

A. I don't know whether I told him or not.

Q. What do you say now, did you hear it whistle or didn't you?

A. I won't swear to it.

Q. You won't swear that you told him or didn't?

A. I don't know anything what I told him. It was very immaterial to me." (R. 86)

Re-direct examination:

"Q. This is no fooling matter between you and Mr. Cobb, you and me, you and the Court, or you and the jury. We want to know, everyone wants to know what you heard and what you saw. Now I ask you, under oath, your oath as you sit there, whether you heard this whistle back of the curve or not?

A. I didn't hear any whistle back of the curve.

Q. Now I ask you if whether just prior to the impact you heard a whistle?

A. No I won't swear that I did.

Q. May you have heard a whistle just prior to the impact?

A. I might but I won't swear that I did.

Q. What is your best recollection, your honest recollection about it?

A. I don't think to my best recollection that the whistle blew at that time." (R. 87)

Reference is particularly made to pages 86 and 87 of the Record as to the testimony of Stevens. It is not only contradictory, but is insufficient on its face to support a finding that a warning was not given.

Gulf R. R. Co. v. Wells, 275 U. S. 455.

On the other hand each member of the train crew testifies to warning signals which were being given for Stewart Park crossing from a whistling post at a point approximately 1000 feet north of the point of the accident to the time and place of the accident. (R. 170, 171, 198, 199, 206, 208, 212.)

Subsequent points deal with the questions of decedent's negligence and his assumption of the risks.

POINT II.

The question of whether a duty exists to sound warning signals is one of law, and is not to be resolved by a jury out of inferences of fact to be drawn from incompetent evidence, inapplicable rules of a railroad, and speculation.

By process of reasoning hitherto not employed in this case, the Plaintiff-Petitioner has sought to build up out of a series of facts, theories and circumstances, a duty upon the motorman to sound, for the benefit of the decedent, a warning upon the curve on which this fatal accident occurred.

The duty to warn, it is claimed, arises (a) by virtue of defendant's written rules, (b) by virtue of its customary practice, (c) by virtue of the exercise of ordinary care and prudence in the circumstances. It is then argued that if anything is lacking by which a duty to warn may not be resolved out of either (a), (b) or (c), then by combining them all that duty may be spelled out.

The Defendant-Respondent takes up the discussion of these theories under the sub-title designations given them by the Plaintiff-Petitioner.

(a) The rule book of the Lehigh Valley Railroad Company specifies that the symbol "O" signifies a short blast of the whistle, and the symbol "—" represents a longer blast. Subdivision D of Rule 14 provides as follows:

> "(q) O—O running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signals and approaching curves and other points where the employees may be at work on track or bridges."

This rule was introduced in evidence at page 54 of the Record over the objection of the defendant.

Rule 1028 provides as follows:

> "Enginemen of engines running light must exercise great care in looking out for motor cars, handcars and trucks and sound the whistle frequently at dangerous places, or where the view of the approaching trains are obstructed, to warn the employees using these cars of their approach."

This rule was introduced in evidence on pages 55 and 56 of the Record over the objection of the defendant.

Neither of the rules is applicable. Neither had anything to do with the movement which was taking place at the time of the fatal accident. The Ithaca branch is a single track road. (R. 162) The rule being printed in the rule book in bold face type, on its face and by the language of the rule book itself, does not apply to single track roads. (R. 140, 142, 162) It is common knowledge that the expression "running against the current of traffic" applies only to trains running on double track roads in a direction opposite to the customary flow of traffic. Such is the proven fact of the case. (R. 125, 162) Plaintiff-Petitioner urges that the testimony of one Truman (R. 115) makes it a question of fact whether the rule does or does not apply to a single track road. It is needless to refute this claim since the record is bare of any evidence that the train in question was running against the current of traffic and replete with evidence that it was not.

The train in question was an ordinary gasoline train of two cars. (R. 173) It was a regular train, running on a regular schedule. (R. 151) It was thus not running light.

There is nothing in the evidence with respect to the rules from which it may be inferred that it was the duty of the engineer to signal for the benefit of track inspectors at the curve and at the time in question. He cannot be deemed to have committed a wrongful act because he may have failed to comply with a rule which had no application.

It is not conceivable that every rule requiring the sounding of a warning may be introduced into evidence and made the basis of a verdict without regard to its application.

That the rules Subdivision D of Rule 14, and 1028 respectively may be made the foundation of a verdict for the plaintiff and of the establishment of a duty toward Rocco, there must be proof that the train that struck him was (1) "running against the current of traffic" and (2) "running light." This was not only not susceptible of proof, but in each case the contrary is absolutely established.

(b) By the testimony of one Kish, the plaintiff's witness, who stated that trains running south had during the time of his employment blown a whistle at this crossing (R. 47), the Plaintiff-Petitioner urges that there has been established a custom to signal at the curve upon which Rocco was entitled to place reliance.

A train running south passes a whistling post 852 feet, plus 253 feet, plus 366 feet, a total of 1471 feet, north of the entrance to Stewart Park in the City of Ithaca (R. 25, 26). Pursuant to the rules of the road the highway crossing whistle warning must be given so as to start a blast at the whistling post and prolong the blast to a point not to exceed 200 feet from the crossing (R. 194). The curve at which the accident occurred is well within the space within which the regular crossing whistle must by this rule be blown. The accident happened 663 feet north of the crossing entrance to Stewart Park (R. 78). Thus no custom is inferable or was proven of signaling at the curve for the benefit of trackwalkers or other employees. The regular sounding of a crossing whistle at the curve in pursuance of the recognized legal duty to persons using the highway crossing cannot be deemed to have established a custom of signaling for employees. And under the established doctrine of this Court since the deceased was not within that class of persons for whose benefit the highway crossing warning is given, the failure to give such signal warrants no foundation for a cause of action for the decedent's death.

Chesapeake & Ohio Railroad Co. v. Mihas, 280 U. S. 102.

O'Donnell v. Providence & Worcester Railway Co., 6 R. I.

211, cited with approval in C. & O. R. R. Co. v. Mihas, supra.

Carfellow v. D. L. & W. R. R. Co., 54 Federal 2nd 475.

(c) Lastly, the petitioner urges that under the circumstances there was a duty in the exercise of ordinary care and prudence to give a signal on approaching a curve.

The Lehigh Valley Railroad Company had promulgated two rules governing Rocco's conduct.

Rul 823 provides as follows:

> "Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time on any track in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train. (R. 139).

Without regard to rule this court and the Federal District and Circuits Court of Appeal have laid down a similar course of conduct for track inspectors.

Chesapeake & Ohio Railroad Co. v. Nixon, administrator, 271 U. S. 218

Biernacki v. Pennsylvania Railroad Co., 45 Federal 2nd 677. Certiorari denied 283 U. S. 841.

Reynolds v. New York, Ontario & Western R. R., 42 Federal 2nd 164

Another rule, separate and distinct from Rule 823, but which supports and gives force and reason to Rule 823, is the oral rule prohibiting operators of speeders similar to that used by Rocco from occuying the main track without first ascertaining from telegraph operators the whereabouts of approaching trains in both directions (R. 163). Every telegraph facility of the road was made available to Rocco to enable him to get this information (R. 124, 125). At this point it is intended to discuss the effect of these rules with respect only to the question of negligence of the engineer.

To support the theory that ordinary care and prudence required the giving of a signal on approaching a curve, the plaintiff cites several cases. Without re-citing or attempting to enter into a discussion of the facts of each case, it may be fairly said that in each case the engineer had actual knowledge of the danger and actual knowledge of the presence of the workmen in the place of danger. In the case of Chicago, Milwaukee & St. Paul v. Kane, 33 Federal 2nd 866, cited by the plaintiff, there was so much actual knowledge of danger to the employee on the part of the engineer that the court held it a case for the jury on the doctrine of "last clear chance".

In the case at bar there is no evidence from which it can possibly be inferred that the engineer expected to meet Rocco or any other employee on the curve. Had Rocco obeyed the rules (and the engineer had the right to assume that he would) there would not only have not been a remote possibility of danger to Rocco with the resulting necessity of warning him, but it would have been definitely certain that he would not have been on the track.

The validity and force of the rules in question have not at any time been seriously attacked in this case. The evidence to support them is overwhelming and abundant, and is discussed more fully in subsequent Points. The engineer was entitled to depend on Rocco's obedience of them.

Insofar as Rocco was concerned, the train which struck him was to all intents and purposes on time. Plaintiff-Petitioner urges that the lateness of the train created an unusual and extraordinary condition. But the information which he should have obtained in the proper exercise of his duty dispels any claim that as to Rocco there was an unusual, extraordinary or surprise movement. There was available to him, and he was charged with obtaining, information far more definite, specific and reliable than a train schedule or time table. This lateness of the train charged the engineer with no extra duty of caution with respect to Rocco.

It is thus submitted that upon no theory has the plaintiff made out a duty, and the breach thereof, on the part of the engineer to signal for the benefit of Rocco on approaching the curve. No rule prevailed, no custom had been established, and no duty of care towards Rocco (whose presence on the track was not possible of anticipation) required such warning. If, under no theory was there a duty to give warning to Rocco, it is inconceivable that such duty can be deemed to spring into being upon a combination of all three theories.

The weakness of the argument that even though under theories (a), (b) and (c) no duty arose to give a warning signal at the curve, then upon a combination of all, the duty did arise, seems very clear if consideration be given to the acts and duties of the engineer at the particular time and place. He was busily engaged in the operation for which a railroad primarily exists, that of getting his train to its destination. The duty imposed upon him by law was to perform that task in the manner in which it would be performed by a reasonably prudent man. No reasonably prudent man engaged in the operation in which this engineer was engaged could be expected to be giving attention to inapplicable rules, unestablished customs, and the possibility of negligence of Rocco, and because of the combination deem himself obligated to give a special signal at the curve.

POINT III.

The doctrine of Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218 controls the case at bar and the plaintiff may not recover. By its doctrine the decedent in the case at bar was not only guilty of primary negligence, which negligence was the sole proximate cause of the accident, but the accident occurred out of circumstances and conditions the risk of which he assumed.

The language of this Court in the Nixon case warrants

the construction (a) that at the time that Nixon was killed the employees of the railway company who were operating the engine which struck Nixon, were negligent, (b) that such negligence was not the primary cause of the accident, (c) that the negligence of Nixon was the primary cause of the accident, and (d) that the nature of Nixon's work was such that he assumed the risk of the danger of being run down in the manner in which he was killed.

(a) In digesting the opinion in respect of how this Court treated the question of the negligence of the railroad servants who were operating the engine, we find the following significant language:

> "For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout and the question raised is whether as toward the deceased, the defendant owed a duty to keep a lookout or whether on the other hand the deceased took the risk." Page 219.

> "The duty of the railroad company towards this class of employees was not affected by that which it might owe to others." Page 220.

We submit that this phraseology admits of no other construction than that a failure to watch on the part of the operators of an engine is, and may properly be found by a jury to be, negligence.

(b) Since it is unquestionably true under the Federal Employers' Liability Act that contributory negligence on the part of the employee does not defeat a recovery and further that under ordinary circumstances an employee does not assume the risk of negligence of a co-employee, it must be assumed that this Court held that Nixon's negligence which is hereinafter discussed, was the primary negligence resulting in his death, and that while there may have been negligence on the part of the operators of the engine in not keeping a lookout, such failure to keep a lookout was not a breach of any duty toward Nixon.

(c) and (d) In examining the opinion in respect of the negligence of Nixon, and upon the question of assumption of risk, we find the following language:

> ". . . . and the question raised is whether as toward the deceased, the defendant owed a duty to keep a lookout or whether on the other hand the deceased took the risk.
>
> If the accident had happened an hour later, when the deceased was inspecting the track we think there is no doubt that he would have been held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

The fair construction of the above language is that Nixon not only assumed the risk of being run down in a circumstance where the operator of the engine was not on the lookout but that by not keeping a continual watch himself, he was guilty of negligence which was the primary negligence and the sole proximate cause of the accident which caused his death.

If there was no duty in the Nixon case to warn Nixon, it is impossible that there could have been such a duty toward Rocco in the case at bar. Nixon was occupying the track at his usual time. There is no evidence, and the circumstances exclude as a possibility, that Nixon had any means of obtaining information as to the trains at or before the time he was killed. His back was toward the train that ran him down and he was proceeding in the same direction. A wind was blowing against Nixon and the train, thereby lessening the sound. It must be assumed that this Court determined that under the circumstances existing, the Railroad Company was under no duty to warn Nixon, for if it had been under such duty, it would not be excused by its failure to keep a proper lookout, thereby not seeing Nixon.

In the case at bar the plaintiff's very theory precludes any possibility that the engineer could see Rocco in time to avoid the accident, and unlike the Nixon case, Rocco had the duty, by the rules of the road, of ascertaining the location of the train that struck him and of avoiding it.

In comparing the negligence of Rocco and the negligence of Nixon, it appears that Nixon failed to look within a distance of perhaps 2000 feet while a train was bearing down on him. In the case at bar, we find that Rocco failed to get available information as to the location of the train which struck him and thereby failed to exercise that caution which he alone could use for his own protection. There is no possible explanation why Rocco's ability to watch the train was not equally as good as Nixon's. There is no reason why Rocco, charged with knowledge of the oncoming train, could not have got off his speeder, pushed it, and proceeded with care around the curve. No reason has been set forth why he did not wait in Ithaca the few minutes which would have had to elapse before the train which struck him would have reached Ithaca in its ordinary running time.

As to the assumption of risk arising from their duties, the cases cannot be differentiated. Rocco's duties were identical with those of Nixon's. Their equipment was exactly the same. Their duties were identical. Their risks were identical. Rocco however assumed an additional risk, one not necessary in his relation with his master. He undertook to proceed on the main track without the information which was available to him. He elected not to get the information which would have kept him off the track entirely until the passenger train had passed and which, at the very least, would have made him watchful, had he elected to proceed on the track depending upon his own watchfulness. He elected to engage in his dangerous enterprise unaware of danger, in unconcern of oncoming trains, his unconcern being evidenced by the fact that he stopped and conversed with the witness Stevens while even then the train was bearing down on him. (R. 61)

It is respectfully submitted that the opinion in the Nixon case must dispose of the case at bar. Every conclusion to be drawn from that opinion negatives the possibility that effect could be given to its doctrine only when there is a straight track, when the train is on time, and where the wind is not blowing. Within its doctrine and under the rules of the road, Rocco was required to "expect trains to run at any time, on any track, in either direction."

The opinion in the Nixon case contains no more than a restatement by this Court of the general rule which has been the doctrine in all jurisdictions in the United States since the commencement of railroad litigation. That doctrine may best be stated in the language contained in 4 Elliott on Railroads (3rd Edition) Section 1862, which is as follows:

> "Ordinarily section men or trackmen assume the risk incident to the running of trains, whether extra trains or trains running on schedule time. Such employees are bound to know that regular trains may be delayed and pass at uncertain intervals and that wild or extra trains may be sent over the road and they assume the risks of danger therefrom, except in cases where by some act or conduct the employer has impliedly or expressly represented that no wild or extra trains shall imperil the safety of such employees. It has also been held that the fact that the train was running at unusual rate of speed at the place of injury and in violation of a city ordinance does not relieve a section man from the rule that such employees assume the risk of wild as well as regular trains running over the tracks at all times at any rate of speed, without warning except from the noise of the train, and by the customary signals."

These words are given dignity and importance by the reference to them by this Court in the Nixon case and by the quotation in Watts v. Pere Marquette R. R. Co., 231

Mich. 40, as well as by frequent references to it in applicable cases in the Courts of many jurisdictions.

Chesapeake & Ohio Railroad Company v. Mihas, 280 U. S. 102

Aerkfetz v. Humphrey, 145 U. S. 418.

Reynolds v. New York, Ontario & Western Railroad, 42 Federal 2nd 164.

Carfellow v. Delaware, Lackawanna & Western R. R., 54 Federal 2nd 475.

Southern Railroad Co. v. Verelle, 57 Federal 2nd 1008.

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L. & N. R. R. Co. v. Vaughn, 204 Ky. 156.

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Bennett v. A. T. & S. F. Ry. Co., 191 Iowa 1333, 183 N. W. 424.

Kirkland v. Bixby, (Mo) 222 S. W. 462.

Land v. R. R. Co., 95 Kan. 441.

Davis as Director General v. Powell, 140 Va. 649.

N. & W. Ry. Co. v. Gesswine, 144 Fed. 56.

Biernacki v. Pennsylvania Railroad Co., 45 Federal 2nd 677 Certiorari denied 283 U. S. 841.

In the last cited case, Circuit Judge Chase, dissenting, stated as follows:

> "I agree that, after the Nixon case, it is not to be thought that the Railroad ordinarily owes any duty to warn any employee engaged in inspecting its track, of the approach of trains. Consequently, the employee assumes the risk of trains approaching without warning while he is at work."

The dissenting Judge then found occasion to differ with the majority on the grounds that there had been proven a custom of giving warning at the point in question. Though there was a dissent, this Court refused to grant certiorari.

Various expressions from the opinions in the cases cited above are indicative of the definiteness and force of the rule. In Bennett v. A. T. & S. F. Ry. Co., 191 Iowa 1333, 183 N. W. 424, the plaintiff's intestate was a trackwalker, was killed in the performance of his duties, and claimed negligence in the failure to give warning of the approach of a train. The Court said,

> "It is not customary, nor is it obligatory, to notify a trackman of the running of the trains by the railroad company; and although Bennett had a right to use the track in the performance of his duties, he was bound to know that a train might put in an appearance at any moment, and it was obligatory upon him to keep a lookout for his own safety." Page 1338.

In Kirkland v. Bixby, 222 S. W. 462, the Court said,

> "The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have a right to expect a clear track, and the humanitarian rule (when violated) is the only salvation for the unfortunate section man."

The cases above cited abound with references which need not be cited here. The doctrine of the Nixon case is founded upon them and the Nixon case embodies the accepted view of the jurisdictions of this country.

POINT IV.

The negligence of Rocco was "Primary" as that word is used in this court.

In previous points Rocco's negligence has been discussed. The facts have been repeated and need not be set forth further at this time.

Recovery has been denied in this court in cases arising under the Federal Employers Liability Act upon the ground that the injured employee was guilty of primary negligence which resulted in his injuries in the following cases:

Davis v. Kennedy, 266 U. S. 147.

Unadilla Valley Railroad Co. v. Caldine, 278 U. S. 139.

Freese v. Chicago, Burlington & Quincy R. R. Co., 263 U. S. 1.

Southern Railway Co. v. Gray, 241 U. S. 333.

While the word "primary" was not used in the Nixon case, we believe that one of the reasons for this Court's decision in that case was that Nixon was guilty of primary negligence.

In each case where recovery has been denied under the Federal Employers Liability Act because the injured person was guilty of the primary negligence, we find that the injured or killed employee was primarily responsible for setting into motion those forces which caused his injury or defendant, but where Courts as a matter of law refused to compare the negligence of the defendant with that of the injured employee. It is often found to have been invoked in those cases where an employee, reckless of his own safety, places reliance on overcaution on the part of co-employees.

Great Northern R. R. Co. v. Wiles, 240 U. S. 444.

So in the case at bar Rocco set the forces into motion that brought about his disaster. His rights on the track were inferior to those of the train with which he collided. They were made inferior by rule, were inferior by law and

by custom. The very duties of Rocco as compared with the duties of the train crew made their respective rights inferior and superior respectively. The train ran on schedule, reported at stations, communicated with safety employees and its location was always known with reasonable certainty.

The work of Rocco was necessarily informal. He could not, and did not report, and he was admittedly compensated for his inferior rights and his special duties of caution by an efficient telegraph system which was always at his service. Notwithstanding his inferior rights, and his particular duty to exercise caution, he proceeded on his way without inquiry, unable to properly anticipate oncoming trains and in a manner as shown by the witness Stevens, of unconcern for oncoming trains. Within the cases cited above, his negligence was the primary negligence. That he would have been guilty of such negligence could not have been anticipated by the engineer of the regular train and his failure to anticipate that Rocco would be on the track was not the primary cause of the accident.

The cases decided by this Court and referred to by the Court of Appeals (R. 271) and in the dissenting opinion of the Appellate Division of the Supreme Court of the State of New York, (R. 261) were not decided upon any limited, constricted definition of the term "primary negligence". The foundation of the decisions and the reason for them may be stated in the language of this Court in the Caldine case.

> "He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own actions. Davis v. Kennedy, 266 U. S. 147."

Conclusion.

The Plaintiff-Petitioner asks that the judgment of the Trial Court be reinstated. The Court of Appeals of New York has rendered its decision upon the law in the case. It thereupon became unnecessary for the Court of Appeals to give consideration to those matters in the conduct of the trial of the case which the Defendant-Respondent has claimed, throughout the litigation, to have been errors on the part of the trial Justice in the reception of evidence and in the charge. There has been discussed in this brief the question of errors in the reception in evidence of inapplicable rules and in the trial Justice's permitting the jury to speculate upon their meaning and applicability. (Charge of the Trial Court R. 225, 226, 227) The trial Court also permitted the jury to speculate on, and determine as it saw fit, the force and effect of the rule which required the decedent to inquire as to the location of trains. (R. 230, 231) Without any evidence of any kind that the rule was not in full force and effect, except that on two occasions Rocco violated it and was reprimanded, the Court permitted the jury to find the rule flexible or inflexible as it saw fit. The effect of such a charge, to which exception was duly taken, (R. 242) was to permit the jury to find that an employee might abrogate a rule promulgated for his own safety and the safety of all persons on the railroad, by disobeying the rule.

These matters were not required to be passed upon by the Court of Appeals of New York and are pointed out here that this Court may see the foundation of, and the reason for, a verdict for the plaintiff upon the trial.

It is respectfully submitted that the judgment of the Supreme Court of the State of New York, based upon the Remittitur of the Court of Appeals of the State of New York should be affirmed.

HOWARD COBB,
HAROLD E. SIMPSON,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

No. 359.—October Term, 1932

Mary Rocco, as Executrix of the Last Will and Testament of Joseph Rocco, deceased,

against

Lehigh Valley Railroad Company, Petitioner

PETITION FOR REHEARING

The Lehigh Valley Railroad Company hereby presents its petition for a rehearing in the above entitled cause.

The following is a statement of the grounds upon which this petition is based.

It is respectfully urged that in imposing upon railroads, and in permitting a jury to impose upon railroads, a duty to warn an employee engaged in Rocco's duties, at every curve, and to have its trains under control at every curve, this Court has so far departed from every pronouncement on the subject as seriously to impair the ordinary and customary operation of a railroad. Since all railroads are now patrolled by some manner of vehicle, the importance of this decision is manifest.

To confine the doctrine of the Nixon case, 271 U. S. 218, to straight stretches of track, and to require on curves the sounding of whistles, and having trains under control, for the benefit of track inspectors whose duty it is to obtain information of oncoming trains and avoid them, is to require the operation of trains in a manner similar to the operation of automobiles. It was held in the Nixon case, which applied to a single track road, that there was no duty whatsoever to keep on the lookout for track inspectors on similar vehicles, and thus there was no duty to give warning to a track in-

spector slowly moving on his tricycle, while the train which killed him rapidly bore down on him from behind. This Court now seemingly disregards the theory of the Nixon case that railroads are primarily operated for train movements.

To have a train under control at a curve necessarily means to operate it at a speed which will permit stopping it in time to prevent a collision. For Rocco's benefit this Court has held the whistle should have been continuously blown on this road having many curves, and each curve should have been rounded at a speed which would have permitted a stop in time to avoid Rocco.

The opinion in the case at bar departs from that doctrine which has its statement in Chesapeake & Ohio v. Mihas, 280 U. S. 102. We refer to the following sentence contained in the opinion in the case at bar:

> "We think these facts required that the jury should determine whether the motorman exercised reasonable care to have his train under control, to sound a warning before entering the curve, and to be on the lookout for workmen whose presence might be expected on the day in question, when the waters of the lake were washing over the tracks at this point and inspection and repair might be required."

Rocco's daily duties were to inspect and make minor repairs on the track. The whole branch line was, and now is, patrolled in like manner and with like equipment. On the date of the fatal accident, and at the point of the accident, there was no deviation from the normal. There were no extraordinary circumstances. The train was late, but Rocco must be charged with complete knowledge of its lateness. There was no washout at the place in question. Rocco was proceeding northerly in his customary and everyday manner. operating his three wheeled vehicle. The engineer is chargeable with only ordinary prudence. He knew of the rule which forbade Rocco occupying the track without ascertaining from the operator the whereabouts of approaching trains in both directions. He knew also of the written rule which provides as follows:

> "Employees must stand outside and clear of all main

tracks while trains are passing; they must expect trains to run at any time on any track in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train." (R. 139)

Both he and Rocco knew that the conditions at the curve in question were normal. The adequacy of the rules of the Company has not been attacked. Only the engineer's conduct has been brought into question. This Court has held in substance, that because he did not operate the train in a manner which might be required if there were workmen on the track, and if the tracks were washed out, his conduct was negligent. It is urged that the duty of the engineer and of the defendant, to Rocco, is not measured by conditions that might (but did not) exist at the curve, but by the actual conditions at the time and point of the accident.

The train was late, but that was normal so far as Rocco was concerned. The train was not proceeding at an excessive speed. There was no condition of the track at the point of the accident requiring repair. There were no workmen on the track at the point except Rocco, whose duties brought him there in the same conditions four times a day. This Court has, in substance, said that as to the decedent, there existed a duty of care equal to that which would have been required had there been a washout and had there been workmen engaged in repair.

Thus despite Rocco's contract of employment, which, by the rules, required him to avoid trains, and despite his violation of the rule requiring him to obtain knowledge of the whereabouts of trains, and even though conditions were normal at the particular point where the injuries occurred, this Court charges the railroad with a duty to give special warning to Rocco and to have the train under control for his benefit.

Writing in the case of Chesapeake & Ohio Railroad Company v. Mihas, this Court said:

". . . and the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation

unless that duty or obligation was one owing to the complainant."

Reference was made in the Mihas case, to the Nixon case as stating the same proposition.

So the measure of care which the engineer owed to Rocco, is limited to Rocco personally under the conditions that existed at the particular location where the accident occurred. Since there was no washout, and since as to Rocco no condition existed except those conditions which existed, and now exist, at every curve at all times, it necessarily follows that the opinion in the Rocco case is absolute authority for the proposition that on every railroad, and at all times, on main lines and branch lines, there is a duty on the part of an engineer in approaching every curve, to blow a whistle for patrolmen and to have the train under control.

Main lines and branch lines are patrolled at all times by vehicles either operated by man power or by gasoline. At all times, patrol and inspection are necessary for the protection of life and property. Efficient operation under the rule of care adopted in the case at bar, is an impossibility.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of the State of New York be, on further consideration, affirmed.

Respectfully submitted,

HOWARD COBB

HAROLD E. SIMPSON

Counsel for Petitioner.

CERTIFICATE OF COUNSEL

We, Howard Cobb and Harold E. Simpson, counsel for the above named Lehigh Valley Railroad Company, petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

HOWARD COBB

HAROLD E. SIMPSON

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SUPREME COURT OF THE UNITED STATES.

No. 359.—October Term, 1932.

Mary Rocco, Executrix, etc., Petitioner, *vs.* Lehigh Valley Railroad Company. } On Writ of Certiorari to the Supreme Court of the State of New York.

[February 6, 1933.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner's husband, while riding a track inspection tricycle, was killed in a head-on collision with an electrically operated passenger train on a single track branch of the respondent's railroad connecting Ithaca and Auburn, New York. The line, which skirted the eastern shore of Cayuga Lake, was subject to washouts in stormy weather. Primarily to protect four daily passenger trains, the decedent, Rocco, an experienced employee, was assigned to inspect a section extending from Ithaca to a point about 7½ miles north of that city. His schedule required him to leave Ithaca at 6:30 A. M., preceding the morning northbound train, and to return in advance of the southbound train, which arrived at Ithaca at noon; to go out again at 3:30 P. M., about an hour and a half before the afternoon train left Ithaca, and to return ahead of the train from Auburn, which was due at Ithaca at 8:30 P. M.

On December 8, 1927, there was a high west wind blowing across Lake Cayuga, which had driven the waters over the track at various points and been the cause of washouts and delays. The southbound train due at Ithaca at 12:23 P. M. was over three hours late. At 3:30 in the afternoon Rocco left to cover his inspection beat, and was struck by the train about a mile from Ithaca, on a blind curve, where he could not see the approaching train nor the motorman see him.

A rule with which Rocco was familiar forbade trackwalkers to occupy the main track without first ascertaining from the operator the whereabouts of approaching trains in both directions. Rocco's

practice had been to comply with this rule. On one or more occasions when he failed to do so he had been reprimanded for the omission. He must have known on the day of the accident that heavy washouts had occurred and that the train which should have arrived at 12:23 was somewhere on the line. It reached Ludlowville, eight miles north of Ithaca, the last reporting station prior to reaching Ithaca, at 3:14 P. M. This fact Rocco could have ascertained if, in compliance with the rule, he had inquired of the operator.

Suit was brought in the Supreme Court of New York, under the Federal Employers' Liability Act, by Rocco's executrix, who averred that his death resulted from negligent failure to operate the train at proper speed, omission to warn him of its approach by whistle or bell, and breach of the duty to provide him with a safe place to work. The defenses were that decedent assumed the risk and that his negligence barred a recovery. Upon the trial a verdict of $~~15,000~~ 12,096 was rendered, which the jury reduced forty per cent. on account of Rocco's contributory negligence. The Appellate Division affirmed judgment for the petitioner (231 App. Div. 323). The Court of Appeals ordered that the complaint be dismissed (259 N. Y. 51). The case is here on certiorari from the judgment of dismissal entered by the trial court pursuant to mandate.

The questions presented are whether under the circumstances the respondent owed the decedent any duty to warn him of the approach of the train, or to keep a lookout for him; and whether Rocco's disobedience of the rule was in such sense the primary cause of his death as to render immaterial any neglect on the part of the motorman. The Court of Appeals decided both questions against the petitioner.

Respondent relies on the duty of a person employed on the tracks of a railroad to exercise vigilance for his own safety, and to keep out of the way of moving trains, and asserts that the chance of a collision was a risk assumed by an employee assigned to work on the roadbed. *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Chesapeake & Ohio Ry. Co.* v. *Nixon*, 271 U. S. 218. Those cases applied the principle to accidents on a stretch of track where the workman's view was unobscured. Here, according to the proof, the curve on which the collision occurred, and obstructions at the side of the roadway, prevented any but a very short view of the track ahead. We think these facts required that the

jury should determine whether the motorman exercised reasonable care to have his train under control, to sound a warning before entering the curve, and to be on the lookout for workmen whose presence might be expected on the day in question, when the waters of the lake were washing over the tracks at this point and inspection and repair might be required. Under the authorities cited the decedent assumed the risks ordinarily incident to his employment as a track inspector, but in the circumstances shown we do not think they included a failure on the part of the motorman to keep a lookout and to give warning in places where the view of one who might be expected to be on the track or approaching in the opposite direction was shut off and the probability of accident was therefore much greater than where the track is straight and the view unobstructed. The issues of negligence of the motorman and contributory negligence of the decedent were for the jury.

The Court of Appeals held, as matter of law, that Rocco's negligence was the primary cause of the accident, and therefore the petitioner could not maintain the action. This ruling was made in reliance upon the authorities of which *Davis* v. *Kennedy*, 266 U. S. 147, *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, and *Southern Ry. Co.* v. *Youngblood*, 286 U. S. 313, are typical. These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound. In none was there any negligence on the part of employees operating the train moving in the opposite direction, with which the collision took place.

These decisions are not controlling in the present case. There is no suggestion that the rule upon which the respondent relies forbade Rocco to start on his inspection trip if he ascertained that the approaching train was within seven or eight miles of Ithaca. It was his duty to make his afternoon trip. The rule required no more than that before leaving he should acquaint himself with the whereabouts of trains on the branch and guide himself accordingly. If he had made inquiry, whether he should await the arrival of

the train, or attempt to meet it at some point a short distance from that city, was a matter for his decision. If the rule had forbidden him to leave under circumstances such as inquiry by him would have disclosed, this case would be parallel with those cited. His disregard of the rule was none the less an element in the case. Whether he was guilty of negligence was to be determined in the light of all facts he knew, or ought in the exercise of reasonable care to have known. How he would have conducted himself, and what precautions he would have taken had he ascertained the exact whereabouts of the train, is a matter of speculation. The jury adjudged him guilty of contributory negligence and moulded its verdict accordingly. But it was open to the jury, as above shown, to find that the motorman of the train was also guilty of negligence which contributed to the collision. Rocco's infraction of the rule was a concurrent cause, but may not in any proper sense be held the primary cause of the accident. His negligence did not preclude a finding by the jury that his death was in part due to the negligence of the respondent's servants. The Act imposes liability upon the carrier for injury or death resulting "in whole or in part" from the negligence of any of its officers, agents or employees (U. S. C. Tit. 45, § 51).

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

Mr. Justice McReynolds and Mr. Justice Butler are of opinion that the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.